No. 14-185

Title: Noel Reyes Mata, Petitioner
v.
Loretta E. Lynch, Attorney General

Docketed: August 18, 2014

Lower Ct: United States Court of Appeals for the Fifth Circuit

Case Nos.: (13-60253)

Decision Date: March 5, 2014

Rehearing Denied: May 16, 2014

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Aug 14 2014	Petition for a writ of certiorari filed. (Response due September 17, 2014)
Sep 17 2014	Order extending time to file response to petition to and including October 17, 2014.
Oct 9 2014	Order further extending time to file response to petition to and including November 17, 2014.
Nov 17 2014	Brief of respondent Eric H. Holder, Jr., Attorney General filed.
Dec 2 2014	Reply of petitioner Noel Reyes Mata filed.
Dec 3 2014	DISTRIBUTED for Conference of January 9, 2015.
Jan 12 2015	DISTRIBUTED for Conference of January 16, 2015.
Jan 13 2015	Record received from U.S.C.A. 5th Circuit. The record is electronic.
Jan 16 2015	Petition GRANTED. William Peterson, Esquire, of Houston, Texas, is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
Feb 27 2015	Deferred appendix filed. (Statement of costs filed.)
Feb 27 2015	Brief of petitioner Noel Reyes Mata filed.
Feb 27 2015	Brief of respondent Eric H. Holder, Jr., Attorney General supporting reversal and remand filed.
Mar 5 2015	Brief amicus curiae of National Immigrant Justice Center filed.
Mar 6 2015	SET FOR ARGUMENT ON Wednesday, April 29, 2015
Mar 6 2015	Brief amici curiae of The American Immigration Council, et al. filed.
Mar 16 2015	CIRCULATED.
Mar 30 2015	Brief of Court-appointed amicus curiae in support of the judgment below filed. (Distributed)
Apr 6 2015	Motion for divided argument filed by respondent Eric H. Holder, Jr., Attorney General.
Apr 17 2015	Motion for divided argument filed by respondent GRANTED.
Apr 21 2015	Reply of respondent Eric H. Holder, Jr., Attorney General filed. (Distributed)
Apr 22 2015	Reply of petitioner Noel Reyes Mata filed. (Distributed)
Apr 29 2015	Argued. For petitioner: Mark C. Fleming, Boston, Mass. For respondent in support of reversal and remand: Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For amicus curiae in support of judgment below: William

	R. Peterson, Houston, Tex. (Appointed by this Court.)
Jun 15 2015	Judgment REVERSED and case REMANDED. Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, Ginsburg, Breyer, Alito, and Sotomayor, JJ., joined. Thomas, J., filed a dissenting opinion.
Jul 17 2015	JUDGMENT ISSUED.

14 No. 185

In The
Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

RAED GONZALEZ
Counsel of Record for Petitioner
GONZALEZ OLIVIERI LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
(713) 481-3040
rgonzalez@gonzalezolivierillc.com

[Additional Counsel Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

NAIMEH SALEM
SHERIDAN GREEN
EDWIN REYES
GABRIEL GUZMAN
BRUCE GODZINA
GONZALEZ OLIVIERI LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
NSalem@gonzalezolivierillc.com

BRIAN K. BATES
REINA & BATES
123 Northpoint Drive, Suite 190
Houston, TX 77060
(281) 820-6100

ALEXANDRE I. AFANASSIEV, ESQ.
FOSTER QUAN LLP
600 Travis, Suite 2000
Houston, TX 77002
(713) 625-9225

QUESTION PRESENTED FOR REVIEW

Given that the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Federal Circuit Courts of Appeals have conclusively and affirmatively held that they have jurisdiction over denials by the Board of Immigration Appeals of requests to equitably toll motions to reopen, the question presented is:

> Whether the Fifth Circuit Court of Appeals erred in this case in holding that it has no jurisdiction to review Petitioner's request that the Board equitably toll the 90-day deadline on his motion to reopen as a result of ineffective assistance of counsel under 8 C.F.R. § 1003.2(c)(2).

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

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CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's petition for rehearing en banc, *Mata v. Holder*, No. 13-60253 (5th Cir. May 16, 2014), is unreported.

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's petition for review, *Mata v. Holder*, No. 13-60253 (5th Cir. March 5, 2014), is unreported.

The decision of the Board of Immigration Appeals ("BIA") denying Petitioner's motion to reconsider, Noel Reyes Mata, A200-723-795 (BIA, June 27, 2013), is unreported.

The decision of the Board of Immigration Appeals denying Petitioner's motion to reopen, Noel Reyes Mata, A200-723-795 (BIA, March 22, 2013), is unreported.

The decision of the Board of Immigration Appeals summarily dismissing Petitioner's appeal, Noel Reyes Mata, A200-723-795 (BIA, Sept. 21, 2012), is unreported.

The Oral Decision and Order of the Immigration Judge, Noel Reyes Mata, A200-723-795 (Immigration Judge, August 24, 2011), finding Petitioner ineligible for cancellation of removal is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on March 5, 2014 and his petition for rehearing en banc on May 16, 2014. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. § 1254(1) because Petitioner is a "party to any civil or criminal case, before or after rendition of judgment or decree."

APPLICABLE LAW

8 U.S.C. § 1229a(c)(7)(A), which provides,

> An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

8 U.S.C. § 1229a(c)(7)(C)(i), which provides,

> Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

8 C.F.R. § 1003.2(c)(1), which provides,

> In general. – A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to

reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

8 C.F.R. § 1003.2(c)(2), which provides,

Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings

(whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

8 C.F.R. § 1003.2(a), which provides,

General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

STATEMENT OF THE CASE AND RELEVANT FACTS

This case involves the Fifth Circuit Court of Appeal's application of 8 U.S.C. § 1229a(c)(7)(C)(i) and 8 C.F.R. § 1003.2(c)(2), which concern an alien's motion to reopen. The specific issue is whether a request to equitably toll the 90-day deadline provided in the statute and regulation is a non-jurisdictional claim-processing rule subject to equitable tolling that is reviewable by the judiciary.

Petitioner was convicted for misdemeanor assault. He conceded removability, and sought cancellation of removal under 8 U.S.C. § 1229a(b) which was denied. He appealed to the BIA, but his attorney failed to file a brief. More than 90 days later, he filed a motion to reopen with new counsel, asserting ineffective assistance of counsel against his prior attorney. The BIA refused to equitably toll the deadline for motions to reopen. Inexplicably, the Board found that Respondent was not prejudiced because his argument on the merits was presented to the Board in a supplemental brief instead of a "proposed appellate brief." The BIA thus denied the motion to reopen as well as a subsequent motion to reconsider. Petitioner filed timely petitions for review of both decisions, asking the Fifth Circuit Court of Appeals to overrule the BIA's decision not to equitably toll the deadline on motions to reopen.

On March 5, 2014, the Fifth Circuit panel dismissed Petitioner's appeal on the grounds that it

lacked jurisdiction to review the BIA's denial of Respondent's request for equitable tolling of the statutory deadline on motions to reopen. App. 1-3. The panel acknowledged that Petitioner conceded that his motion to reopen was filed outside of the 90-day window provided by 8 C.F.R. § 1003.2(c)(2). App. 2. *See also* 8 U.S.C. § 1229a(c)(7)(C)(i). The panel also acknowledged that Petitioner asserted that the BIA should have equitably tolled the filing period because of the ineffective assistance of prior counsel. App. 2. However, the panel then cited its unique doctrine, announced in *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008), that an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed in the Fifth Circuit as an invitation for the BIA to exercise its discretion to reopen the removal proceedings *sua sponte*. App. 2. Consequently, because the Fifth Circuit holds (as do all the other circuits) that there is no meaningful standard against which to judge the Board's exercise of its *sua sponte* power, the Court had no jurisdiction to review the request for equitable tolling. App. 2-3.

Petitioner's qualm is not with the second step of the Fifth Circuit's logic, that the Board's *sua sponte* discretion is unreviewable, but with the first step, that a request for equitable tolling is equivalent to a request for *sua sponte* power. It is only with this latter contention that Petitioner disagrees, as do all of the other Federal Circuit Courts of Appeals.

Petitioner contends that the Fifth Circuit's analysis is incorrect because of this Court's ruling in

Henderson v. Shinseki, 131 S. Ct. 1197, 179 L. Ed. 2d 259 (2011). *Henderson* found that "claim-processing rules," which "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times," are "[a]mong the types of rules that should not be described as jurisdictional." *See Henderson*, 131 S. Ct. at 1203.

Petitioner therefore argues that in light of *Henderson* the filing deadline in 8 C.F.R. § 1003.2(c)(2) is a claim-processing rule seeking to promote the orderly progress of litigation and hence is subject to equitable tolling. Petitioner is not alone in his argument that there is judicial review of a denial of a request for equitable tolling; every other Federal Circuit Court has concluded that it has jurisdiction to review the BIA's decision not to apply equitable tolling, as will be demonstrated, *infra*. Furthermore, the Fifth Circuit has declined to follow this Court's precedent in *Henderson* or align itself with every other Circuit Court of Appeals on this issue. The Fifth Circuit's precedent in *Ramos-Bonilla v. Mukasey* that a request for equitable tolling of the 90-day deadline on motions to reopen is an implied request for the BIA to use its *sua sponte* authority has no foundation in the law and contradicts numerous precedents. Because the 90-day deadline is not jurisdictional, equitable tolling is implied, as it is in every federal statute absent the express contrary intent of Congress. Therefore, Petitioner urges this Court to grant certiorari and reverse the Fifth Circuit's denial on jurisdictional grounds.

A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA § 242(a)(1), 8 U.S.C. § 1252(a)(1), which provides for judicial review of a final order of removal.

B. Background

The Petitioner, Mr. Noel Reyes Mata, is a native and citizen of Mexico. On September 14, 2010, he was convicted for misdemeanor assault pursuant to Tex. Penal Code § 22.01(a). App. 15.

C. Before the Immigration Judge

On January 24, 2001, Petitioner admitted the allegations against him, conceded removability, and sought cancellation of removal under 8 U.S.C. § 1229a(b). App. 14-15. The immigration judge denied the application for cancellation of removal. App. 18.

D. Administrative Appeal

Petitioner's former counsel timely filed a Notice of Appeal with the BIA, but he negligently failed to file a brief. App. 6. As a result, the BIA summarily dismissed Petitioner's appeal on September 21, 2012. App. 7.

Subsequently, Petitioner retained new counsel and, on January 14, 2013, filed a motion to reopen his case based on ineffective assistance of counsel

pursuant to *Matter of Lozada*, 19 I&N Dec. 637 (BIA). App. 7. However, the BIA held the motion to reopen to be untimely as it was filed 25 days after the statutory 90-day deadline for motions to reopen, even though Petitioner was not aware of his former counsel's negligence until after such deadline had elapsed. App. 6-7. The Board stated that the deadlines for motions to reopen could be equitably tolled, but refused to do so, claiming that Petitioner had not shown prejudice. The BIA also denied the motion because Petitioner had not jointly submitted a proposed appellate brief along with the motion to reopen under *Matter of Lozada*.[1] App. 8.

Petitioner filed a petition for review with the Fifth Circuit Court of Appeals on April 18, 2013.

On April 19, 2013, Petitioner filed a motion to reconsider the denial of the motion to reopen with the BIA, submitting the proposed appellate brief in the form dictated by the Board in its prior decision. App. 4-5. On June 27, 2013, the BIA dismissed the motion to reconsider on the basis that the proposed appellate brief should have been submitted with the motion to reopen. App. 4.

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[1] The BIA's decision in this regard was excessively formalistic, particularly considering that Petitioner had filed a supplemental memorandum containing his proposed legal argument on the merits. The Board noted the filing of the supplemental motion in its footnote, and even responded to the legal argument, despite stating incorrectly that the argument was not properly before it. [SAR 67].

Petitioner filed a second petition for review with the Fifth Circuit Court of Appeals on July 26, 2013.

E. Judicial Review

On March 5, 2014, the Fifth Circuit panel dismissed Petitioner's petitions for review on the grounds that the Court lacked jurisdiction to review the BIA's denial of Petitioner's request for equitable tolling of the statutory deadline on motions to reopen. App. 2-3. The panel acknowledged that Petitioner conceded that his motion to reopen was filed outside of the 90-day window provided by 8 C.F.R. § 1003.2(c)(2). App. 2. *See also* 8 U.S.C. § 1229a(c)(7)(C)(i). The panel also acknowledged that Petitioner asserted that the BIA should have equitably tolled the filing period because of the ineffective assistance of prior counsel. App. 2. However, the panel then cited its unique doctrine, announced in *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008), that an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed in the Fifth Circuit as an invitation for the BIA to exercise its discretion to reopen the removal proceedings *sua sponte*. App. 2-3. Consequently, because the Fifth Circuit holds (as do all the other circuits) that there is no meaningful standard against which to judge the Board's exercise of its *sua sponte* power, the Court held it had no jurisdiction to review the request for equitable tolling. App. 3.

Petitioner then filed a Petition for Rehearing En Banc, arguing that the Fifth Circuit should overturn

Ramos-Bonilla v. Mukasey. The Petition for Rehearing was dismissed on May 16, 2014. App. 24-25.

ARGUMENT FOR ALLOWING THE WRIT

The issue in this case is whether the Fifth Circuit has jurisdiction to review the BIA's decision not to grant equitable tolling where an alien files a motion to reopen under 8 C.F.R. § 1003.2(c) based on ineffective assistance of counsel beyond the 90-day deadline stated in that regulation as well as 8 U.S.C. § 1229a(c)(7)(C)(i). In its denial of Petitioner's petition for review, the Fifth Circuit misunderstood the implications of *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203-04, 179 L. Ed. 2d 259 (2011), which held that claim-processing rules are not jurisdictional and permit equitable tolling. The implication of *Henderson* is that an 8 C.F.R § 1003.2(c) motion to reopen is not jurisdictional, but is merely a claim-processing rule, and as such it is subject to equitable tolling. Because the equitable power to toll statutes of limitations is "read into every federal statute of limitation," the Fifth Circuit's construal that a request for equitable tolling requires the invocation of the BIA's *sua sponte* authority is incorrect. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S. Ct. 582, 90 L. Ed. 743 (1946).

All of the Federal Circuit Courts of Appeals except for the Fifth Circuit now agree that they have jurisdiction to review a decision of the Board of

Immigration Appeals denying a claim for equitable tolling of the 90-day deadline for a motion to reopen. Most have explicitly relied on the logic that the 90-day deadline is a claim-processing rule or a statute of limitations as opposed to being jurisdictional and therefore naturally subject to equitable tolling. *See Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011) ("Those numerosity and timeliness requirements are not jurisdictional and therefore qualify for equitable tolling if the petitioner has been diligent."); *Borges v. Gonzalez*, 402 F.3d 398 (3d Cir. 2005); *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013) ("Every circuit to have addressed the issue [of the 90-day statutory deadline for motions to reopen] has held that this provision constitutes a statute of limitations to which the principles of equitable tolling apply."); *Joshi v. Ashcroft*, 389 F.3d 732, 734-35 (7th Cir. 2004) (distinguishing between deadlines that govern transitions from one court to another, which are jurisdictional, and number and time limitations, which are not and can be equitably tolled); *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) ("After an examination of the text, structure, legislative history, and purpose of Congress's 1990 amendment to the INA, we join the Second and Ninth Circuits and agree that there is no indication, either explicit or implicit, that Congress intended that this limitations period not be equitably tolled.") (internal citations omitted); *Avila-Santoyo v. AG*, 713 F.3d 1357, 1365 (11th Cir. 2013) ("the 90-day deadline for a motion to reopen is a non-jurisdictional claim-processing rule subject to equitable tolling").

In its argument that it lacks jurisdiction to consider an alien's petition for review of a denial of equitable tolling by the BIA, the Fifth Circuit relied on its precedent decision in *Ramos-Bonilla v. Mukasey*, 543 F.3d 216 (5th Cir. 2008). In *Ramos-Bonilla*, the Fifth Circuit determined that a request for equitable tolling is, in effect, a request for the BIA to exercise its *sua sponte* authority, and is therefore unreviewable. 543 F.3d at 220.

Petitioner contends that the Fifth Circuit's holding in *Ramos-Bonilla* was entirely unfounded and runs counter to decades of jurisprudence on the issue of equitable tolling. It has long been understood that the power to equitably toll a statute of limitations has rested with the courts in equity and need not be provided for by law. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (finding that equitable tolling is "read into every federal statute of limitation"); *see also Young v. United States*, 535 U.S. 43, 49-50, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle") (internal quotation marks and citations omitted); *see, e.g., Jones v. Conoway*, 4 Yeates 109 (Pa. 1804) (applying the doctrine of equitable tolling).

Additionally, even if the Fifth Circuit's precedent in *Ramos-Bonilla* were not counter to decades of jurisprudence, it additionally creates a Suspension

Clause issue. As the Second Circuit correctly reasoned in *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011), "[i]f petitioners lack a forum in which to raise such [ineffective assistance of counsel and government interference] claims, then we are confronted squarely with the 'serious constitutional questions' raised by the Supreme Court in *St. Cyr*" (*referencing INS v. St. Cyr*, 533 U.S. 289, 315, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001)). Because Petitioner was deprived of a motion to reopen due to ineffective assistance of counsel, his right to habeas corpus under the U.S. Constitution has been infringed, which the Fifth Circuit should have found created jurisdiction as a constitutional question.

The Fifth Circuit's construal of requests for equitable tolling as implied invocations of the BIA's *sua sponte* power stands in opposition to the holdings of every other Federal Circuit Court, all of which have found that they have the power to review an alien's request for equitable tolling of a statutory motion to reopen under § 1003.2(c)(2). We therefore ask that this writ be granted to resolve the Fifth Circuit's break with every other U.S. court of appeals and with this well-established rule.

A. An alien's request for equitable tolling of the 90-day statute of limitations on motions to reopen is reviewable as a non-jurisdictional claim-processing rule under *Henderson*.

In *Henderson*, this Court discussed its attempts to "bring some discipline" to the use of the "jurisdictional label." *Henderson v. Shinseki*, 131 S. Ct. at 1202. *Henderson* involved a veteran's failure to file a notice of appeal for the denial of benefits to the Veteran's Court within a 120-day period. 131 S. Ct. at 1201. He had missed the deadline by 15 days. *Id.* The issue before the Court was whether or not the rule was jurisdictional, since a jurisdictional rule cannot be excused based on equitable factors. *Id.* at 1202. The Court explained that rules should not be considered jurisdictional unless it governs a court's adjudicatory capacity. The Court explained, however, that "claim-processing rules" that "seek to promote the orderly progress of litigation" are generally not jurisdictional and are therefore subject to judicial review. *Id.* at 1202-03. In determining whether or not a rule is jurisdictional, the intent of Congress is key. The Court concluded there was not any indication that Congress intended the rule at issue to be jurisdictional. *Id.*

Petitioner contends that according to *Henderson* the 90-day deadline under 8 C.F.R. § 1003.2(c) and 8 U.S.C. § 1229a(c)(7)(C)(i) for motions to reopen is not jurisdictional, but rather is a claim-processing rule subject to judicial review. As stated *supra*, equitable

power to toll is "read into every federal statute of limitation," so it follows logically that the Fifth Circuit had jurisdiction to review the BIA's denial of Petitioner's request for equitable tolling, considering that a request for equitable tolling of the § 1003.2(c)(2) statute of limitations is intrinsically intertwined with the statute itself. *Holmberg*, 327 U.S. at 397.

B. A request for equitable tolling is not an invitation for the BIA to exercise its *sua sponte* authority; rather, it is an equitable right descending from multiple decades of legal precedent.

The Fifth Circuit incorrectly held in *Ramos-Bonilla* that a request for equitable tolling is essentially an invitation for the BIA to use its *sua sponte* discretion. *Ramos-Bonilla*, 543 F.3d at 220 ("a request for equitable tolling of a time- or number-barred motion to reopen on the basis of ineffective assistance of counsel is 'in essence an argument that the BIA should have exercised its discretion to reopen the proceeding sua sponte based upon the doctrine of equitable tolling'"), *quoting Ben Jie Lin v. Mukasey*, 286 Fed. Appx. 148, 150 (5th Cir. 2008) (per curiam) (unpublished). *Ben Jie Lin*, however, cited no authority for this rule. In short, the precedent upon which the Fifth Circuit decided this entire case not only contradicts all other authority but is entirely bootstrapped. *Ramos-Bonilla* relies on nothing but an unpublished decision which in turn relies on nothing, not even an argument.

Again, it is important to distinguish between the rule (accepted by none but the Fifth Circuit) that equitable tolling is an implied request for *sua sponte* authority from the rule (accepted in every circuit) that there is no judicial jurisdiction of the Board's use of its *sua sponte* authority.

The power to equitably toll statutes of limitations arises from decades of judicial precedent. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (finding that equitable tolling is "read into every federal statute of limitation"); *see also Young v. United States*, 535 U.S. 43, 49-50, 122 S. Ct. 1036, 152 L. Ed. 2d 79 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle[.]") (internal quotation marks and citations omitted); *see also Jones v. Conoway*, 4 Yeates 109 (Pa. 1804) (applying the doctrine of equitable tolling). The Fifth Circuit's interpretation that "equitable tolling is not a basis for filing an untimely or numerically-barred motion under the statute or regulations," fails to recognize that there is no need for a statutory provision for equitable tolling because equitable tolling is simply assumed to exist where it is not explicitly disclaimed. *Ben Jie Lin*, 286 Fed. Appx. at 150; *Young*, 535 U.S. at 49-50. As such, the *Ramos-Bonilla* line of precedent has been incorrect in finding that the statute of limitations could only be tolled by the BIA's *sua sponte* authority.

C. The Fifth Circuit's rule – that a request for the BIA to equitably toll the deadlines on a motion to reopen is in essence a request for the BIA to utilize its *sua sponte* authority – strips aliens of the right to habeas corpus relief and denies them of their rights under the Suspension Clause.

Assuming, *arguendo*, that the Fifth Circuit was correct that equitable tolling may only be applied by the discretion of the BIA, the Fifth Circuit would still have jurisdiction to review the BIA's decision under constitutional grounds because of a Suspension Clause violation. In its precedent decision finding that it cannot consider the BIA's decision to exercise or not exercise its *sua sponte* authority, the Fifth Circuit relies on authority stemming from *Heckler v. Cheney*, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985) ("review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion").

In *INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (2001), this Court explained the scope of constitutional habeas protection required for aliens. The Court held that aliens are entitled to habeas protection at least "as it existed in 1789." 533 U.S. at 301 (*quoting Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). The Court conducted a historical review of the scope of habeas jurisdiction not only on issues of statutory construction, but it also stated that such review traditionally "encompassed

detentions based on errors of law, including the erroneous application or interpretation of statutes," *id.* at 302, challenges to "[e]xecutive interpretations of the immigration laws," *id.* at 307, determinations of an alien's "statutory eligibility for discretionary relief," *id.* at 314 n.38, and "questions of law that arose in the context of discretionary relief," *id.* at 307.

The Suspension Clause of the U.S. Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. The Court stated that "some judicial intervention in deportation cases is unquestionably required by the Constitution" because of that clause. *St. Cyr*, 533 U.S. at 300. "[T]he question becomes whether the statute stripping jurisdiction to issue the writ avoids the Suspension Clause mandate because Congress has provided adequate substitute procedures for habeas corpus." *Boumediene v. Bush*, 553 U.S. 723, 771, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008). Some circuits have suggested that the 8 C.F.R. § 1003.2(c) motion to reopen serves as a substitute for habeas corpus. *See Luna v. Holder*, 637 F.3d 85, 95 (2d Cir. 2011) ("[i]f Petitioners lack a forum in which to raise [habeas] claims, then we are confronted squarely with the 'serious constitutional questions' raised by the Supreme Court") (*citing St. Cyr*, 533 U.S. at 314).

While the Fifth Circuit may be correct that it is unable to consider the BIA's ruling on purely discretionary matters, the BIA's interpretation of the law

and of constitutional issues is not purely discretionary. The Circuit Courts have the power to consider discretionary agency decisions without impinging on the discretion of the agency. *See Kucana v. Holder*, 558 U.S. 233, 248, 130 S. Ct. 827, 175 L. Ed. 2d 694 (2010) ("[a] court decision reversing the denial of a motion to reopen does not direct the Executive to afford the alien substantive relief; ordinarily, it touches and concerns only the question whether the alien's claims have been accorded a reasonable hearing"). Additionally, the motion to reopen serves as "an important safeguard" and is necessary to "ensure a proper and lawful disposition." *Dada v. Mukasey*, 554 U.S. 1, 3, 128 S. Ct. 2307, 171 L. Ed. 2d 178 (2008); *reaffirmed in Kucana v. Holder*, 558 U.S. 233, 235, 130 S. Ct. 827, 829, 175 L. Ed. 2d 694 (2010).

Here, as a result of ineffective assistance of counsel (itself potentially a constitutional due process violation, *see Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), Petitioner's right to his statutory motion to reopen was taken away, which, according to *Luna v. Holder*, *supra*, violates the Suspension Clause. Therefore, even if the Fifth Circuit is correct that a request for equitable tolling to the BIA is a request for the BIA's *sua sponte* authority, the Circuit Courts of Appeals must have jurisdiction in any case because the lack of right to a motion to reopen or some other habeas substitute is a constitutional violation.

The Fifth Circuit's construal of a request for equitable tolling as an invitation for the BIA to exercise

its *sua sponte* authority eliminates the adequacy of the § 1003.2(c) motion to reopen as a habeas substitute by limiting the habeas right without explicit Congressional intent to do so. *See INS v. St. Cyr*, 533 U.S. at 298 ("For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction."). The Fifth Circuit's rule has created a constitutional problem where one need not exist. The precedent in *Ramos-Bonilla* unduly restricts the habeas right of Petitioner and should therefore be overruled to allow the Petitioner to seek some form of habeas relief under the Suspension Clause.

D. The Fifth Circuit's decision creates an unnecessary circuit split because every other circuit recognizes that it has the jurisdiction to review requests for equitable tolling.

As previously stated, Petitioner's argument that the Fifth Circuit has jurisdiction to consider his request for equitable tolling due to ineffective assistance of counsel is supported by ten out of eleven circuits to have considered the issue. As the following case law demonstrates, the Fifth Circuit is now entirely alone in this position as every other circuit court has now held that it has jurisdiction over claims of equitable tolling since the deadlines in 8 U.S.C.

§ 1229a(c)(6-7) do not implicate subject matter jurisdiction.

Although the First Circuit has "declined to resolve whether the INA's procedural limitations are further subject to equitable tolling for exceptional circumstances such as ineffective assistance of counsel," *Muyubisnay-Cungachi v. Holder*, 734 F.3d 66, 72 (1st Cir. 2013), it disagrees with the Fifth Circuit as to whether it holds jurisdiction in such a situation. *See Neves v. Holder*, 613 F.3d 30, 35-37 (1st Cir. 2010) ("We hold that we have jurisdiction to review the BIA's decision to deny equitable tolling of the time and number limitations governing Neves's second motion to reopen but not to review the BIA's refusal to exercise its *sua sponte* authority to reopen."). Prior to *Neves*, the First Circuit had held that it lacked jurisdiction over all motions to reopen, but it reversed its prior position based on the U.S. Supreme Court's holding in *Kucana v. Holder*, 558 U.S. 233, 130 S. Ct. 827, 175 L.Ed.2d 694 (2010), that "decisions on motions to reopen proceedings, like other proceedings made discretionary by regulation and not by statute, are generally subject to judicial review." *Id.* at 33.[3]

The Second Circuit in *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011), held that for the statutory right to a

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[3] It appears that *Kucana*'s holding had no direct impact on the Fifth Circuit's jurisprudence because the Fifth Circuit had correctly determined as early as 2005 that it retained jurisdiction over the BIA's denials of motions to reopen immigration proceedings. *See Zhao v. Gonzalez*, 404 F.3d 295, 303 (5th Cir. 2005).

motion to reopen to be a valid substitute for habeas relief, the BIA may not preclude a claim for equitable tolling. *Id.* at 99 ("An alien who files a motion to reopen is entitled to equitable tolling when he exercises due diligence in filing the motion and shows that he was prevented by ineffective assistance of counsel or governmental interference from filing the motion on time. *See id.* If the BIA denies such equitable tolling, the alien may petition this Court for review of that decision.") *See also Iavorski v. INS*, 232 F.3d 124, 127 (2d Cir. 2000) (finding 90 days may be equitably tolled but denying tolling on facts where counsel never filed appeal for lack of due diligence). The Second Circuit has also held that counsel's performance can be "so ineffective as to have impinged on the fundamental fairness of the hearing in violation of the [F]ifth [A]mendment due process clause." *Saleh v. Dept. of Justice*, 962 F.2d 234, 241 (2d Cir. 1992).

The Third Circuit also permits equitable tolling of the 90-day deadline on motions to reopen if the petitioner has shown due diligence. *See Alzaarir v. Att'y Gen. of U.S.*, 639 F.3d 86, 91 (3d Cir. 2011); *Borges v. Gonzalez*, 402 F.3d 398 (3d Cir. 2005). In *Borges*, the Third Circuit found that the 180-day deadline for filing a motion to reopen following an *in absentia* order was subject to equitable tolling because it was analogous to a statute of limitations rather than being jurisdictional. 402 F.3d at 406.

The Fourth Circuit has explicitly stated that because "[e]very circuit to have addressed the issue [of the 90-day statutory deadline for motions to reopen]

has held that this provision constitutes a statute of limitations to which the principles of equitable tolling apply," it "agree[s] with [its] sister circuits and now hold[s] that § 1229a(c)(7)(C)(i) sets forth a limitations period that can be equitably tolled." *Kuusk v. Holder*, 732 F.3d 302, 305 (4th Cir. 2013).

The Sixth Circuit permits equitable tolling of the 90-day deadline on motions to reopen if the petitioner has shown due diligence. *See Gordillo v. Holder*, 640 F.3d 700, 704-06 (6th Cir. 2011) (time was equitably tolled and court found due diligence despite five year delay in seeking reopening where petitioner inquired of three lawyers and a notary and was never told he qualified for NACARA).

The Seventh Circuit also falls with the majority. In *Gaberov v. Mukasey*, 516 F.3d 590, 593-97 (7th Cir. 2008), the court granted a motion to reopen an order denying asylum by applying equitable tolling of the four-year-old order, where the petitioner erroneously received another person's final order, inquired, and was told his case was still pending. Additionally, in *Joshi v. Ashcroft*, 389 F.3d 732, 734-35 (7th Cir. 2004), the court distinguished between deadlines that govern transitions from one court to another, and number and time limitations. *Id.* The latter are jurisdictional and cannot be equitably tolled, but the former are not jurisdictional and can be equitably tolled. *Joshi*, 389 F.3d at 734-35; *see also Yuan Gao v. Mukasey*, 519 F.3d 376, 379 (7th Cir. 2008) (a 75-day wait to file motion to reopen was deemed to be lack of due diligence).

The Eighth Circuit has also adopted the majority position. *See Valencia v. Holder*, 657 F.3d 745, 748-49 (8th Cir. 2011) (a wait of three years to file motion to reopen with new counsel was not due diligence).

The Ninth Circuit permits equitable tolling if the petitioner is prevented from filing "because of a deception, fraud, or error, as long as the petitioner acts with due diligence in discovering the deception, fraud, or error." *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011); *see also Singh v. Ashcroft*, 367 F.3d 1182, 1185-86 (9th Cir. 2004) (where respondent filed motion to reopen on 91st day, the time for filing was equitably tolled due to former counsel's ineffective assistance in not filing brief resulting in summary dismissal); *Iturribarria v. INS*, 321 F.3d 889, 897-99 (9th Cir. 2003) (finding 90 days equitably tolled until respondent met with new counsel and became aware of previous counsel's ineffectiveness).

The Tenth Circuit is also in accord. *See Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002) ("[a]fter an examination of the text, structure, legislative history, and purpose of Congress's 1990 amendment to the INA, we join the Second and Ninth Circuits and agree that there is no indication, either explicit or implicit, that Congress intended that this limitations period not be equitably tolled") (internal citations omitted).

The official position of the Eleventh Circuit was formerly that the 90-day deadline is jurisdictional. *See Abidi v. Att'y Gen. of the U.S.*, 430 F.3d 1148, 1150 (11th Cir. 2005); *see also Anin v. Reno*, 188 F.3d 1273,

1278-79 (11th Cir. 1999). However, the Eleventh Circuit reversed its view in *Avila-Santoyo v. AG*, 713 F.3d 1357, 1365 (11th Cir. 2013), holding that "the 90-day deadline for a motion to reopen is a non-jurisdictional claim-processing rule subject to equitable tolling."

In fact, the Fifth Circuit itself once determined in an unpublished decision that it had jurisdiction to examine petitions for review where an alien's motion to reopen was denied for untimeliness, but has since reversed course. *See Torabi v. Gonzalez*, 165 Fed. Appx. 326 (5th Cir. 2006) (unpublished) ("the denial was based solely on the motion's untimeliness under 8 C.F.R. § 1003.2(c)(2). Thus, we have jurisdiction to review the denial of Torabi's motion to reopen") (*citing Medina-Morales v. Ashcroft*, 371 F.3d 520, 525-27 (9th Cir. 2004) ("Because the 90-day limitations period under 8 C.F.R. § 1003.2(c)(2) is not jurisdictional, the doctrine of equitable tolling may be applied."). *Id.* at 331. *Medina* in turn cited *Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005).

Because every single circuit but the Fifth agrees that it has jurisdiction to review BIA denials of requests for equitable tolling due to ineffective assistance of counsel, formerly including even the Fifth Circuit itself, Petitioner asks that the Court rule with finality that 8 U.S.C. § 1229a(c)(7)(C)(i) and 8 C.F.R. § 1003.2(c)(2) are non-jurisdictional claim-processing rules and hence are subject to equitable tolling

without an implied request for the BIA to exercise its *sua sponte* power.

CONCLUSION

For the reasons explained above, Petitioner asks that his Petition for Certiorari be granted, and that he be given the opportunity to present his arguments before the Court.

Respectfully submitted,

RAED GONZALEZ
Counsel of Record for Petitioner
GONZALEZ OLIVIERI LLC
2200 Southwest Freeway, Suite 550
Houston, TX 77098
(713) 481-3040
rgonzalez@gonzalezolivierillc.com

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-60253
Summary Calendar

NOEL REYES MATA,
also known as Alberto Reyes Reyes,

Petitioner

v.

ERIC H. HOLDER, JR.,
U. S. ATTORNEY GENERAL,

Respondent

Petitions for Review of an Order of the
Board of Immigration Appeals
BIA No. A200 723 795

(Filed Mar. 5, 2014)

Before BARKSDALE, HAYNES, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Noel Reyes Mata, a native and citizen of Mexico, was ordered removed from the United States in 2010.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

His appeal to the Board of Immigration Appeals (BIA) was dismissed after his attorney failed to file an appellate brief.

Mata subsequently filed an untimely motion to reopen his removal proceedings, based on a claim of ineffective assistance of counsel, and asking the BIA to equitably toll the applicable filing period or exercise its authority to reopen his proceedings *sua sponte*. The BIA denied Mata's motion.

Mata then filed a motion to reconsider. The BIA denied it as well.

Mata seeks review of the BIA's denial of his motions to reopen and to reconsider. He acknowledges his motion to reopen was filed outside the 90-day filing period, after the BIA dismissed his original appeal. *See* 8 C.F.R. § 1003.2(c)(2) (reopening or reconsideration before the BIA). He asserts, however, the BIA should have equitably tolled the filing period because his attorney's failure to file a brief to the BIA deprived him of his right to appeal and violated his due-process rights.

In this circuit, an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the BIA to exercise its discretion to reopen the removal proceeding *sua sponte*. *Ramos-Bonilla v. Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008). As the BIA has complete discretion in determining whether to reopen *sua sponte* under 8 C.F.R. § 1003.2(a), and we have no meaningful standard against which to judge that exercise of

discretion, we lack jurisdiction to review such decisions. *Id.*

Although Mata challenges our court's decision in *Ramos-Bonilla* as decided incorrectly, we may not overturn the prior decision of another panel of our court, absent an intervening change in the law, such as a statutory amendment, or a contrary or superseding decision by either the Supreme Court or this court *en banc*. *E.g.*, *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). Along that line, Mata asserts the Supreme Court, in *Kucana v. Holder*, overturned this court's decision in *Ramos-Bonilla*. Mata overstates the reach of *Kucana*; there, the Supreme Court "express[ed] no opinion on whether federal courts may review the [BIA]'s decision not to reopen removal proceedings *sua sponte*". 558 U.S. 233, 251 n.18 (2010). Because we lack jurisdiction to review the BIA's denial of Mata's untimely motion to reopen, we need not address the merits of Mata's equitable-tolling, ineffective-assistance-of-counsel, and due-process claims.

Additionally, Mata appears to seek review of the BIA's denying his motion to reconsider its denial of his motion to reopen. He fails, however, to provide adequate briefing addressing the BIA's decision on the motion to reconsider, and, as such, has abandoned any challenge he might have raised regarding that decision. *See, e.g.*, *Thuri v. Ashcroft*, 380 F.3d 788, 793 (5th Cir. 2004).

DISMISSED in part; DENIED in part.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A200 723 795 – Houston, TX Date: JUN 27 2013

In re: NOEL REYES MATA a.k.a. Alberto Reyes Reyes

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF DHS: John Donovan
Assistant Chief Counsel

This case was last before us on March 22, 2013, at which time we denied the respondent's untimely motion to reopen proceedings based on alleged ineffective assistance of counsel. The respondent has now filed a timely motion to reconsider this decision on April 19, 2013. The Department of Homeland Security opposes the motion, which will be denied.

We find no reason to disturb our prior decision. *See* 8 C.F.R. § 1003.2; *Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006); *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). The respondent's motion does not identify any specific error in our prior order, or call our attention to a change of law stated or relied upon in our earlier

[1] A courtesy copy of this decision will be mailed to Raed Gonzalez, Esquire, who apparently drafted the respondent's brief and motion.

decision, and we must deny his motion to reconsider. *Id.*

In support of his current motion, the respondent has submitted a proposed appellate brief, which, he argues, evidences the prejudice which he failed to demonstrate in his prior motion (Bd. Dec. at 1-2). Inasmuch as the respondent's motion may be construed as a request to reopen proceedings, his motion is barred by time and number limitations. *See* 8 C.F.R. § 1003.2(c)(2). Moreover, this proposed brief, if considered evidence, could have been proffered during the respondent's previous motion, and we find no other reason to grant the motion in our sua sponte authority. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"). The motion will be, therefore, denied.

ORDER: The motion is denied.

/s/ [Illegible]
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A200 723 795 – Houston, TX Date: MAR 22 2013

In re: NOEL REYES MATA a.k.a. Alberto Reyes Reyes

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Raed Gonzalez, Esquire

ON BEHALF OF DHS: John Donovan
Assistant Chief Counsel

APPLICATION: Reopening

The Immigration Judge's August 24, 2011, decision denied the respondent's application for cancellation of removal to Mexico, holding that he is statutorily ineligible on account of his conviction under the Texas Penal Code of an offense involving moral turpitude. The Board entered the final administrative order on September 21, 2012, when we summarily dismissed the respondent's appeal for failure to file a statement of reasons for the appeal and unexplained failure to file a brief. The respondent filed this motion to reopen his removal proceedings on January 14, 2013. The motion is untimely. *See* section 240(c)(7)(C)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(i) (90-day time limit for filing motion to reopen). The Department of Homeland Security

has filed a memorandum opposing the motion. The motion will be denied.

In bringing this untimely motion to reopen, the respondent claims ineffective assistance of counsel. The Board held in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), that due process rights may be violated when ineffective assistance of counsel prevents an alien from reasonably presenting his case, and the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel. The alien must show that he was prejudiced by counsel's performance. Similarly, in *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003), *aff'd*, *Assaad v. Ashcroft*, 378 F.3d 471 (5th Cir. 2004), the Board recognized an ineffective assistance claim if counsel's representation was so deficient as to prevent the fundamental fairness of the proceeding, but also held that the alien must show prejudice, and will not establish prejudice if he does not document that he is eligible for the relief sought.

In *Matter of Lozada*, *supra*, the Board held that counsel's failure to file a statement of reasons and brief on appeal, although resulting in summary dismissal of the appeal, did not amount to deprivation of due process and was not prejudicial. The alien had received a full and fair hearing at which the Immigration Judge properly considered and evaluated the alien's evidence and correctly determined the legal issues. The same reasoning applies in the present matter. The respondent was convicted of assault under Texas law. The Immigration Judge properly applied the modified categorical approach and examined the

record of conviction to find that the respondent assaulted a family member (as defined) causing bodily injury. The offense therefore went beyond simple assault or offensive touching, and constituted a crime involving moral turpitude. *See* I.J. at 5-9. The respondent's motion does not include a proposed appellate brief or other argument to persuade the Board that the Immigration Judge's decision was incorrect or would have been overturned on appeal if a brief had been filed.[1]

Because the respondent's conviction makes him ineligible for cancellation of removal, the Immigration Judge did not reach the issue of whether the respondent's removal from the United States would result in exceptional and extremely unusual hardship to a qualifying relative. *See* section 240A(b)(1)(D) of the Act, 8 U.S.C. § 1229b(b)(1)(D). The present motion addresses that issue only briefly, with the respondent's affidavit making mention of difficulties in adjustment, loss of educational and economic opportunity, and general conditions of violence in Mexico. Such

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[1] The respondent filed a supplemental memorandum that the Board received on February 5, 2013, addressing, inter alia, the effect of *Esparza-Rodriguez v. Holder*, 699 F.3d 821 (5th Cir. 2012), decided after the Board issued the final administrative order in this matter. The United States Court of Appeals for the Fifth Circuit upheld the Board's modified categorical approach with respect to a related Texas criminal statute, where the record of conviction showed that the assault caused physical injury and went beyond offensive touching. Thus, the Fifth Circuit's decision does not lead to a different result in the respondent's case.

hardships, though real, are common when a family member is removed, and are not "exceptional and extremely unusual" hardships within the meaning of the Act. Therefore, aside from the respondent's ineligibility due to his conviction, the motion to reopen does not document that he is eligible for the relief sought. *See Matter of Assaad*, *supra*.

For the above reasons, the respondent's motion does not demonstrate an exceptional situation that would warrant reopening as an exercise of discretion. *See Matter of J-J-*, 21 I&N Dec. 976, 984 (BIA 1997) (stating that "[t]he power to reopen on our own motion is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship"). Accordingly, the untimely motion will be denied.

ORDER: The motion to reopen is denied.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Houston, Texas

File A 200 723 795 **August 24, 2011**

In the Matter of

NOEL REYES MATA,	)	**IN REMOVAL**
	)	**PROCEEDINGS**
Respondent	)	

CHARGE: **Section 212(a)(6)(A)(1) of the Immigration and Nationality Act, as amended.**

APPLICATION: **Cancellation of removal for certain unlawful permanent residents pursuant to Section 240A(b)(1) of the Immigration and Nationality Act, as amended.**

ON BEHALF OF RESPONDENT:	**ON BEHALF OF THE DEPARTMENT OF HOMELAND SECURITY:**
Aseph Almas, Esquire **440 Benmar Drive** **Houston, Texas 77060**	**John Donovan, Esquire** **Assistant Chief Counsel** **ICE Office of the Chief Counsel** **Houston, Texas**

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Introduction

THE DEPARTMENT OF HOMELAND SECURITY (DHS) commenced these removal proceedings against respondent on September 21, 2010, charging him with being removable pursuant to the above-captioned section of the Immigration and Nationality Act. The hearings in this matter were conducted in Houston, Texas.

At a master calendar hearing held on January 24, 2011, respondent admitted the factual allegations and conceded removability as charged in the Notice to Appear (NTA). Respondent designated Mexico as the country of removal. Should removal become necessary based on respondent's admissions and concessions, in addition to the information memorialized in Exhibit 2, the Court found him removable as set forth in the NTA by clear and convincing evidence. As to relief from removal, the respondent applied for cancellation of removal for certain unlawful permanent residents under Section 240B(a)(1) of the Act. It is respondent's eligibility for such relief that is currently before this Court.

For the reasons set forth below, the Court will deny respondent's cancellation application, Form EOIR-42B as a matter of law.

II. Summary of Evidentiary Record

The record in this case consists of the admission of four Exhibits.

Exhibit 1 is the NTA dated September 15th, 2010. It was filed by DHS on September 21, 2010.

Exhibit 2 is a record of deportable/inadmissible alien, Form I-213, dated September 15, 2010.

Exhibit 3 consists of criminal records relating to respondent's conviction for Assault-Family Member entered on September 14, 2010. The documents are tabbed A-D.

Exhibit 4 consists of respondent's Form EOIR-42B and supporting documents, tabbed A-E.

All admitted evidence identified above has been considered regardless of whether specifically mentioned in the text of this decision.

III. Factual Background

The facts regarding respondent's criminal history are not in dispute. On or about September 14, 2010, respondent pleaded guilty to, and was convicted for, the Class A misdemeanor of Assault-Family Member and *see* Exhibit 3 Tabs A-B. His victim was Vanessa Hernandez, an individual identified as a person with whom respondent had a dating relationship.

The criminal court also made an affirmative finding of family violence in connection with the offense,

see Exhibit 3, Tab B. Prior to the conviction, respondent was ordered to remain away from Ms. Hernandez for 60 days in connection with the entry of an emergency protective order, *see* Exhibit 3 Tab C. For the assault offense, respondent was sentenced to 30 days in county jail.

IV. Statement of the Law

A. Cancellation of Removal for Non-Lawful Permanent Residents

The Legal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), abolished suspension of deportation under former Section 240A of the Act and replaced it with a restrictive procedure called cancellation of removal, effective April 1, 1997, *see* IIRIRA Sec. 304(a)(3); INA Sec. 240A(b)(1). As an applicant for cancellation of removal under Section 240A(b)(1) of the Act, an alien must demonstrate: (1) physical presence in the United States for a continuous period of not less than 10 years immediately preceding the date of application; (2) good moral character during that period; (3) no criminal convictions which are offenses under Section 212(a)(2), 237(a)(2) or 237(a)(3); and (4) removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent or child who is a United States citizen or lawful permanent resident. The applicant's hardship is no longer considered under INA Sec. 240A(b)(1).

B. Crime Involving Moral Turpitude

The term "moral turpitude" is not defined by the Act and has been described as a nebulous concept by the courts, see, e.g.; *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). In identifying conduct that is inherently depraved or intrinsically wrong, courts often look for certain aggravating factors, such as perpetrator's use of unjustified violence or a deadly weapon, the endangerment of human life or the presence of criminal or evil intent. Fundamental to that determination is whether the Act is accompanied by a vicious motive or a corrupt mind, *Hamdan v. INS*, 98 F.3d 183, 186 (5th Cir. 1996).

Pursuant to the Attorney General's decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), this Court must first examine the statutory elements of the conviction under a categorical approach, then, if necessary, consider the record of conviction under a modified categorical approach and can, if necessary, and appropriate, consider evidence beyond the formal record of conviction. The Court may examine documents such as the indictment, the judgment and conviction, jury instructions, assign guilty plea, and a plea transcript. *See Matter of Short*, 20 I&N Dec. 135, 137 (BIA 1989); *Hyder v. Keisler*, 506 F.3d 388, 391 (5th Cir. 2007).

V. Findings of the Court

Inasmuch as respondent's application for cancellation of removal was filed after May 11, 2005, it is

governed by the provisions of the REAL ID Act of 2005. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006). In that regard, respondent fully bears the burden of establishing that he is eligible for the relief that he seeks.

For the reasons set forth below, the Court finds that respondent is statutorily ineligible for cancellation of removal as a matter of law and will pretermit his application. Respondent's conviction for Assault-Family Member is a crime involving moral turpitude, which renders him ineligible for cancellation of removal under Section 240A(b)(1)(C) of the Act.

There is no dispute the respondent pleaded guilty to, and was convicted for, the Class A misdemeanor of assault with an affirmative finding that the victim of the crime was a member of his family. *See* Exhibit 3, Tabs A-B. Under Section 22.01(a)(1) of the Texas Penal Code, a person commits a Class A misdemeanor if he intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse. Texas Penal Code 22.01(a)(1). Section 22.01(a)(1) of the Texas Penal Code is divisible, and that it includes offenses that would be considered crimes involving moral turpitude, as well as offenses that would not, first, it covers simple assaults, which the Board has generally held do not involve moral turpitude, *see Matter of Solon*, 24 I&N Dec. 239, 242 (BIA 2007); *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992). Section 22.01(a)(1) also covers assault against a spouse, which the Board has found in some cases to

be a crime involving moral turpitude because inflicting harm upon a family member is of a different, more serious nature than inflicting harm upon a stranger. *See Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996); *Matter of Sanudo*, 23 I&N Dec. 968, 972 (BIA 2006).

The state statute at issue here is divisible. The Court must use a modified categorical approach and examine the respondent's record of conviction. *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 690 (A.G. 2008). Respondent's judgment of conviction indicates that the presiding judge made an affirmative finding of family violence, *see* Exhibit 3, Tab B, Page 3. Additionally, the criminal information to which respondent pleaded guilty indicates that respondent did unlawfully, intentionally, and knowingly cause bodily injury to Vanessa Hernandez, a person with whom he had a dating relationship, by striking her with his foot and grabbing her with his hand. Under Texas law, a family member is defined as a person in a dating relationship, *see* Tex. Penal Code Ann. Section 22.01(b)(2) (West Subperiod 2010); Tex. Fam. Code Ann. Section 71.0021(b), 71.003, 71.005 (West 2010). Texas law further defines a dating relationship as a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. It does not include a casual acquaintance in a business or social context. Tex. Fam. Code Ann. Section 71.0021(b)-(c).

The Court finds that the respondent's intentional acts of striking or grabbing another with whom he has a close, personal relationship and causing a physical

injury is morally reprehensible and necessarily involves turpitude and misconduct, and thus is a crime involving moral turpitude. *See Matter of Tran*, 21 I&N Dec. 294; *Matter of Sanudo*, 23 I&N Dec. 972. Under Texas law, the maximum punishment for a Class A misdemeanor is one year. *See* Tex. Penal Code Section 12.21(2).

The dispositive issue then becomes whether or not such conviction is described under Section 212(a)(2), 237(a)(2) or 237(a)(3) of the Act, thereby rendering the respondent ineligible for cancellation of removal, *see* I&N Sec. 240A(b)(1)(C). The Board clarified the analysis required in order to determine this question of law in recent precedent decisions. *See Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010); *Matter of Pedroza*, 25 I&N Dec. 312 (BIA 2010). In Cortez, the Board explained that in order to determine if a crime involving moral turpitude is described under Sections 212(a)(2), 237(a)(2) or 237(a)(3) of the Act, only language specifically pertaining to the criminal offense, such as the offense itself, in a sense, imposed or potentially imposed, should be considered. *Matter of Cortez*, 25 I&N Dec. 307. The Board further explained that statutory language relating only to aspects of Immigration Law, such as the requirement under Section 237(a)(2) that an offense be committed within five years after the date of admission is not to be considered a crime involving moral turpitude analysis. The Board concluded that in order for an offense to be described under Section 237(a)(2)(A)(i) of the Act and render a respondent ineligible for cancellation,

the crime must be a crime involving moral turpitude and must be punishable by a sentence to imprisonment for a year or longer. *Matter of Cortez*, 25 I&N Dec. 307.

In light of Board precedent, this Court concludes that respondent has been convicted of an offense described under Section 237(a)(2) of the Act, a crime involving moral turpitude for which a sentence of one year or longer may be imposed and is thus ineligible for relief of cancellation of removal. Furthermore, the question of whether respondent's conviction qualifies for a petty offense exception under 212(a)(2)(A)(ii)(II) of the Act need not be determined, because regardless of the results of such inquiry, the conviction remains an offense described under Section 237(e)(2). Therefore, the Court further concludes that respondent's conviction for assault to a family member renders him ineligible for cancellation of removal.

Respondent has not identified any other form of relief. The circumstances in these proceedings leave no alternative except to issue an order of removal to respondent's native country of Mexico.

VI. Conclusion and Orders

For the reasons discussed, the following orders will enter:

ORDER

IT IS HEREBY ORDERED that respondent's application for cancelation of removal for certain

non-permanent residents under Section 240A(b) of the Immigration and Nationality Act, as amended, is pretermitted and denied as a matter of law.

IT IS FURTHER ORDERED that respondent shall be removed to Mexico on the charge specified in the Notice to Appear, dated September 15, 2010.[1]

Appeal due September 23, 2011.

Date: August 24, 2011.

LISA LUIS
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before LISA LUIS, in the matter of:

NOEL REYES MATA
A 200 723 795
Houston, Texas

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

[1] Respondent will be advised of his appeal rights separately on the record.

/s/ Michael L. Perlman
Michael L. Perlman (Transcriber)

Deposition Services, Inc.
12321 Middlebrook Rd., Suite 210
Germantown, Maryland 20874
(301) 881-3344

September 23, 2011
(Completion Date)

IMMIGRATION COURT
2320 LA BRANCH ST., RM 2235
HOUSTON, TX 77004

In the Matter of Case No.: A200-723-795

REYES MATA, NOEL
Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Aug. 24, 2011. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to MEXICO, ~~or in the alternative to~~

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO or in the alternative to.

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $ _____ with an alternate order of removal to MEXICO.

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] A Waiver under Section ___ was ( ) granted ( ) denied ( ) withdrawn.

[ ] Cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

Respondent's application for:

[X] Cancellation under section 240A(b)(1) was ( ) granted (X) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under section 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ___ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriated documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture's was granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ___ until ___.

[ ] As a condition of admission, respondent is to post a $ ___ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____

Date: Aug 24, 2011

/s/ Lisa Luis
Lisa Luis
Immigration Judge

Appeal: Waived/Reserved By Respondent

Appeal Due By: Sept. 23, 2011

ALIEN NUMBER: 200-723-795

ALIEN NAME: REYES MATA, NOEL

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)

TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [X] ALIEN's ATT/REP [X] DHS

DATE: 8-24-11 BY: COURT STAFF Lisa Luis

Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-60253

NOEL REYES MATA, also known as Alberto Reyes Reyes,

Petitioner

v.

ERIC H. HOLDER, JR., U. S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING EN BANC

(Filed May 16, 2014)

(Opinion ___, 5 Cir., ___, ___,F. 3d ___)

Before BARKSDALE, HAYNES, and HIGGINSON, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be

polled on Rehearing En Banc (FED R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
UNITED STATES CIRCUIT JUDGE

No. 14-185

In the Supreme Court of the United States

NOEL REYES MATA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOYCE R. BRANDA
Acting Assistant Attorney General
DONALD E. KEENER
PATRICK J. GLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals has jurisdiction to review the Board of Immigration Appeals' decision denying petitioner's request for equitable tolling of the 90-day deadline for filing a motion to reopen on account of alleged ineffective assistance of counsel.

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In the Supreme Court of the United States

No. 14-185

NOEL REYES MATA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is reprinted in 558 Fed. Appx. 366. The decisions of the Board of Immigration Appeals denying reconsideration and reopening (Pet. App. 4-5, 6-9) are unreported. The prior decision of the immigration judge ordering petitioner removed (Pet. App. 10-23) and the Board's dismissal of the administrative appeal of that decision are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2014. A petition for rehearing was denied on May 16, 2014 (Pet. App. 24-25). The petition for a writ of certiorari was filed on August 14, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA) permits an alien who is ordered removed from the United States to file a motion to reopen the removal proceedings based on previously unavailable material evidence. 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c). Such a motion is to be filed with the immigration judge (IJ) or the Board of Immigration Appeals (Board), depending upon which was the last to render a decision in the case. 8 C.F.R. 1003.2(a) and (c) (Board); 8 C.F.R. 1003.23(b)(1) and (3) (IJ). The alien must "state the new facts that will be proven at a hearing to be held if the motion is granted" and must support the motion "by affidavits or other evidentiary material." 8 U.S.C. 1229a(c)(7)(B); 8 C.F.R. 1003.2(c)(1), 1003.23(b)(3). An alien is entitled to file only one such motion, and it generally must be filed within 90 days of entry of the final order of removal. 8 U.S.C. 1229a(c)(7)(A) and (C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1).

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases." *INS* v. *Abudu*, 485 U.S. 94, 107 (1988). The IJ and the Board have discretion in adjudicating a motion to reopen, and they may "deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a) (Board); see 8 C.F.R. 1003.23(b)(3) (IJ); see also *INS* v. *Doherty*, 502 U.S. 314, 323-324 (1992).

If the alien fails to file a timely motion to reopen, he may suggest to the IJ or the Board that his case

should be reopened sua sponte. The IJ or the Board may exercise discretion to reopen a case sua sponte at any time. 8 C.F.R. 1003.2(a) ("The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision."), 1003.23(b)(1) (similar for IJ). The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

2. a. Petitioner, a native and citizen of Mexico, entered the United States on an unknown date without being admitted or paroled. Pet. App. 1; Administrative Record (A.R.) 562. In August 2010, he was charged with assault on a family member under Texas Penal Code Ann. § 22.01(a)(1) (West 2011), for striking and grabbing a woman with whom he was then having a "dating relationship." Pet. App. 12; A.R. 523 (information), 526-527 (judgment of conviction). Petitioner pled guilty to the assault charge in September 2010, during a proceeding in which the court also concluded, under Article 42.013 of the Texas Code of Criminal Procedure, that his offense involved "family violence." Pet. App. 12-13; A.R. 526-527; see Tex. Code Crim. Proc. Ann. art. 42.013 (West 2006).

The day after his conviction, the Department of Homeland Security served petitioner with a Notice to Appear charging him with being subject to removal under 8 U.S.C. 1182(a)(6)(A)(i), as an alien present in the United States without having been admitted or paroled. Pet. App. 11; A.R. 562-563. At a hearing before the IJ on January 24, 2011, petitioner conceded

that he was removable as charged. A.R. 196 (hearing transcript).

Petitioner submitted an application for cancellation of removal, a form of discretionary relief available for certain unlawfully present aliens. Pet. App. 11; A.R. 196-197; see 8 U.S.C. 1229b(b). In general, to be eligible for cancellation of removal, such an alien must demonstrate that (1) he has been physically present in the United States for at least ten years immediately preceding the application; (2) he has been a person "of good moral character" during that period; (3) he has not been convicted of an offense under 8 U.S.C. 1182(a)(2), 1227(a)(2), or (a)(3); and (4) he "establishes that removal would result in exceptional and extremely unusual hardship to [his] spouse, parent, or child [who is a United States citizen or lawfully admitted alien]." 8 U.S.C. 1229b(b)(1)(A)-(D).

b. On August 24, 2011, the IJ denied petitioner's application for cancellation of removal and ordered him removed to Mexico on the conceded charge. Pet. App. 10-20. The IJ concluded that petitioner's assault offense constituted an offense under 8 U.S.C. 1227(a)(2)(A)(i), thereby rendering him ineligible for cancellation of removal under 8 U.S.C. 1229b(b)(1)(C). Pet. App. 14-18.

Section 1227(a)(2)(A) encompasses prior convictions for any "crime involving moral turpitude" for which a sentence of one year or longer may be imposed. 8 U.S.C. 1227(a)(2)(A)(i)(I) and (II). Analyzing the statute of conviction under the framework of *In re Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), the IJ determined that the Texas statute under which petitioner was convicted, Tex. Penal Code Ann. § 22.01(a)(1) (West 2011), is a "divisible" statute that

includes both "offenses that would be considered crimes involving moral turpitude, as well as offenses that would not." Pet. App. 14-17. The IJ accordingly applied the modified categorical analysis required by *Silva-Trevino* and noted that (1) the state criminal court had made an explicit finding of "family violence"; (2) petitioner had unlawfully, intentionally, and knowingly injured a person with whom he was in a dating relationship; and (3) under the relevant Texas law, that person is regarded as a family member. *Id.* at 16. Based on those findings, the IJ concluded that petitioner's offense was "morally reprehensible and necessarily involve[d] turpitude and misconduct, and thus is a crime involving moral turpitude." *Id.* at 16-17. Finally, the IJ determined that petitioner's crime of conviction carried a possible sentence of one year or more in prison. *Id.* at 17-18.

Because the IJ determined that petitioner was ineligible for cancellation of removal under 8 U.S.C. 1229b(b)(1)(C), the IJ denied petitioner's application for that relief and ordered that he be removed to Mexico. Pet. App. 17-19.

c. In September 2011, petitioner filed a timely Notice of Administrative Appeal with the Board. A.R. 173-175. The form on which petitioner filed that notice contained an explicit warning instructing him to "clearly explain the specific facts and law on which you base your appeal of the [IJ's] decision" and noting that "[t]he Board may summarily dismiss your appeal if it cannot tell from this Notice of Appeal, or any statements attached to this Notice of Appeal, why you are appealing." A.R. 174. Despite this warning, petitioner failed to explain the factual and legal basis of his appeal and instead simply asserted that the IJ had

erred in denying his application for cancellation of removal and finding that he had been convicted of a crime involving moral turpitude. *Ibid.*

Petitioner also checked a box on the form indicating that he would be filing a brief in support of his appeal. A.R. 174. In October 2011, petitioner received a notice from the Board informing him that he had until November 10, 2011 to submit his brief. A.R. 168-169. The notice informed petitioner that "[i]f you fail to file the brief or statement within the time set for filing in this briefing schedule, the Board may summarily dismiss your appeal." A.R. 168. Despite the notice, petitioner failed to file any brief. A.R. 139.

The Board summarily dismissed petitioner's appeal in September 2012. A.R. 139; see 8 C.F.R. 1003.1(d)(2)(i)(A) and (E). The Board's decision explained that (1) petitioner's Notice of Appeal did not inform the Board of the bases for his challenge to the IJ's decision, and (2) although petitioner checked the box indicating that he would be filing a brief, he failed to file the brief despite being expressly warned that failure to file a brief could result in summary dismissal. A.R. 139. Petitioner did not seek judicial review of that decision.

3. a. Petitioner was served with a copy of the Board's decision dismissing his appeal immediately upon its issuance on September 21, 2012. A.R. 138-139. At that point, he had 90 days—until December 20, 2012—in which to file a motion to reopen his case with the Board. 8 U.S.C. 1229a(c)(7)(C)(i); 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1). By October 15, 2012, petitioner had consulted with new attorneys regarding his case, at least two of whom told him that his prior counsel had performed ineffectively in failing to file an

administrative brief. A.R. 118-119. Nonetheless, petitioner did not file a timely motion to reopen during the 90-day period.

On January 14, 2013—over three weeks after the 90-day period had expired—petitioner sought to reopen his case. Pet. App. 6-8; A.R. 88-95. In that motion, petitioner alleged that he met the requirements for establishing a claim of ineffective assistance of counsel under *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988). Pet. App. 7-8; A.R. 92-95. He did not, however, make any argument as to why his conviction was not for a crime involving moral turpitude; nor did he file any proposed appellate brief challenging that determination by the IJ. Pet. App. 8. Several weeks later, petitioner did file a supplemental memorandum addressing *Esparza-Rodriguez* v. *Holder*, 699 F.3d 821 (5th Cir. 2012), which had been decided after the Board issued the final order in his case. Pet. App. 8 n.1. That decision upheld the Board's application of the modified categorical approach to a related Texas criminal statute. *Esparza-Rodriguez*, 699 F.3d at 823-826; see Pet. App. 8 n.1.

The Board denied petitioner's motion to reopen in March 2013. Pet. App. 6-9. The Board noted that the motion was untimely, but it further stated that "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel." *Id.* at 7 (citing *Lozada*, 19 I. & N. Dec. at 637). The Board then rejected petitioner's assertion of ineffective assistance of counsel. *Id.* at 7-8. The Board held that petitioner had failed to establish any prejudice from his former counsel's failure to file a brief in support of the administrative appeal. *Ibid.* The Board noted that even in his motion to reopen, petitioner did not offer any ar-

gument as to why or how the IJ erred in denying his application for cancellation of removal, and that petitioner had failed to file any proposed brief challenging the underlying decision of the IJ. *Id.* at 8 & n.1. The Board also looked to the decision of the IJ and concluded that the IJ had "properly applied the modified categorical approach and examined the record of conviction to find that [petitioner] assaulted a family member (as defined) causing bodily injury." *Id.* at 7-8. On that basis, the Board concluded that the conviction was for a crime involving moral turpitude, and that the IJ therefore correctly determined that petitioner was ineligible for cancellation of removal on that basis. *Id.* at 8.

The Board then went on to find that petitioner would have been ineligible for cancellation of removal for a second, independent reason—his inability to establish any "exceptional and extremely unusual hardship" to a qualifying family member, as required by 8 U.S.C. 1229b(b)(1)(D). Pet. App. 8-9. The Board thus concluded that, "aside from [petitioner's] ineligibility due to his conviction [for a crime involving moral turpitude], the motion to reopen does not document that he is eligible for the relief sought." *Id.* at 9. In light of those considerations, the Board found that "[petitioner's] motion does not demonstrate an exceptional situation that would warrant reopening as an exercise of discretion." *Ibid.* (citing *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997)).

b. Petitioner filed a timely petition for review of the Board's decision with the court of appeals on April 18, 2013. The next day, petitioner filed with the Board a timely motion to reconsider its denial of his motion to reopen. Pet. App. 4; A.R. 10-15. In an attempt to

address one aspect of the Board's conclusion that he could not establish prejudice, petitioner attached a proposed appellate brief to his motion to reconsider. Pet. App. 5; A.R. 20-31. The substance of that motion, however, was largely a reiteration of the ineffective-assistance-of-counsel claim that petitioner had made in his motion to reopen. See A.R. 12-15, 91-95. Although petitioner's motion criticized the Board's conclusion that he had failed to establish prejudice from the failure to file an administrative brief, it did not assert any specific errors of fact or law in the Board's prior decision. See A.R. 12-15; 8 U.S.C. 1229a(c)(6)(C) (specifying required contents for motions to reconsider).

The Board denied the motion to reconsider on June 27, 2013. Pet. App. 4-5. Its decision emphasized that petitioner had failed to specify any errors of law or fact in its prior decision. *Ibid.* The Board construed petitioner's request for reconsideration as a motion to reopen, insofar as it submitted new evidence, *i.e.*, the proposed appellate brief, and it denied the motion as time- and number-barred. *Id.* at 5. Additionally, the Board found no reason why the brief could not have been proffered with the first motion to reopen. *Ibid.* The Board also discerned no grounds for sua sponte reopening. *Ibid.*

4. Petitioner filed a timely petition for review of the Board's decision denying his motion for reconsideration. The court of appeals considered that petition together with his earlier petition seeking review of the Board's denial of his motion to reopen.

In his brief to the court of appeals, petitioner argued that the Board should have equitably tolled the 90-day deadline for filing a motion to reopen based on

ineffective assistance of counsel. Pet. C.A. Br. 5-15. He acknowledged circuit precedent holding that a request for equitable tolling on that basis must be treated as a request that the Board exercise its sua sponte authority to reopen proceedings, and that the denial of sua sponte reopening is not subject to judicial review. *Id.* at 7 (citing *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008)). Petitioner argued, however, that this precedent was contrary to intervening Supreme Court precedent and the decisions of other courts of appeals that had addressed the issue. *Id.* at 7-10 (citing, *inter alia*, *Kucana* v. *Holder*, 558 U.S. 233 (2010) (holding that denial of motion to reopen is subject to judicial review)); *id.* at 10-13 (collecting court of appeals decisions). Petitioner contended that he acted with due diligence in filing the motion to reopen promptly after the alleged ineffective assistance of prior counsel was discovered, and that the ineffectiveness had prejudiced him, as it foreclosed his ability to present his arguments to the Board on appeal. *Id.* at 14-15. Given those facts, petitioner requested that the court of appeals grant equitable tolling of the motion to reopen deadline and grant his petition for review. Petitioner also argued that the Board had erred in concluding that his state assault conviction was a crime involving moral turpitude. *Id.* at 15-26.

In response, the government argued that the court of appeals lacked jurisdiction to consider the Board's denial of petitioner's request for equitable tolling under the court's prior decision in *Ramos-Bonilla*, 543 F.3d at 220. Gov't C.A. Br. 18-19. The government also defended the Board's decision on the merits, arguing that, in any event, petitioner could not estab-

lish that he was prejudiced by the failure to file an administrative brief on appeal. *Id.* at 19-20; see *id.* at 13-18.

The court of appeals denied in part and dismissed in part the petitions for review in an unpublished decision issued on March 5, 2014. Pet. App. 1-3. The court held that, under *Ramos-Bonilla*, "an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the [Board] to exercise its discretion to reopen the removal proceeding *sua sponte*." *Id.* at 2. Accordingly, the court explained, because "we have no meaningful standard against which to judge that exercise of discretion, we lack jurisdiction to review such decisions." *Id.* at 2-3. The court declined petitioner's request that it overrule *Ramos-Bonilla*, stating that only the en banc court could overrule circuit precedent and explaining that *Ramos-Bonilla*'s holding had not been overturned or called into question by intervening Supreme Court precedent. *Id.* at 3 (citing *Kucana*, 558 U.S. at 233).[1]

Petitioner filed a petition for rehearing en banc. The court of appeals did not call for a response from the government, and in May 2014 that court denied that petition. Pet. App. 24-25.

ARGUMENT

The government agrees with petitioner that the court of appeals erred in denying his petition for review for lack of jurisdiction under *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008). Equitable

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[1] The court of appeals also held that petitioner had abandoned any challenge to the Board's denial of his motion to reconsider. Pet. App. 3.

tolling is available for an alien who demonstrates that ineffective assistance of counsel caused him to miss the 90-day deadline for filing a motion to reopen, so long as the alien complies with the procedural requirements established by the Board for considering such claims. There are adequate standards to be applied by a court of appeals in reviewing Board decisions rejecting arguments for equitable tolling based on ineffective assistance of counsel. *Ramos-Bonilla*'s conclusion that there is no jurisdiction in these circumstances is incorrect, and the court of appeals erred in relying on that precedent. The government therefore has decided to support en banc reconsideration of *Ramos-Bonilla* by the court of appeals. Accordingly, we suggest that the Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand for further consideration in light of the position concerning the court of appeals' jurisdiction set forth in this brief.

In the alternative, the petition for a writ of certiorari should be denied. Although the basis of the court of appeals' decision was flawed, plenary review is not warranted. Even if petitioner were to prevail on his question presented, he could not ultimately obtain relief, for two independent reasons. First, the Board has already concluded that petitioner cannot establish that his removal from the United States would result in "exceptional and extremely unusual hardship" to a qualifying family member, as required by 8 U.S.C. 1229b(b)(1)(D). Petitioner did not challenge that finding in his petition for review in the court of appeals. Second, petitioner became aware of his counsel's alleged ineffective assistance of counsel well before the expiration of the 90-day period for filing a

motion to reopen but failed to file within that period. Petitioner's lack of diligence is an independent reason that he is not ultimately entitled to equitable tolling. As a result, petitioner could not obtain relief even if he prevailed in this Court on the jurisdictional question he presents. For these reasons, if the Court does not vacate the judgment below and remand, it should deny the petition for certiorari.

1. The court of appeals dismissed the petition for review for lack of jurisdiction under its prior decision in *Ramos-Bonilla*. That decision is erroneous. Equitable tolling of the 90-day filing deadline for a motion to reopen may be warranted in cases of ineffective assistance of counsel. A court of appeals therefore has jurisdiction to review the Board's denial of a request for equitable tolling under the traditional abuse-of-discretion standard for review of the denial of a motion to reopen.

a. As the Board correctly noted in this case, "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel." Pet. App. 7. To establish that equitable tolling is warranted based on ineffective assistance of counsel, the Board has established a procedural framework that aliens must follow. See *In re Lozada*, 19 I. & N. Dec. 637, 639 (B.I.A. 1988).[2] The Board requires:

> 1) an affidavit by the alien setting forth the relevant facts, including the agreement with counsel

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[2] The Attorney General has directed the Executive Office for Immigration Review to initiate rulemaking procedures that would culminate in a regulatory framework for addressing ineffective assistance of counsel claims. See *In re Compean, Bangaly & J-E-C*, 25 I. & N. Dec. 1, 2 (A.G. 2009). Proposed rules have not yet been issued.

> regarding the alien's representation; 2) evidence that counsel was informed of the allegations [of ineffective assistance] and allowed to respond, including any response; and 3) an indication that * * * a complaint has been lodged with the relevant disciplinary authorities, or an adequate explanation for the failure to file such a complaint.

Lara v. *Trominski*, 216 F.3d 487, 496 (5th Cir. 2000) (citing *Lozada*, 19 I. & N. Dec. at 639). "In addition to these requirements, an alien alleging ineffective assistance of counsel must also show that he or she was prejudiced by the actions or inactions of counsel." *In re Assaad*, 23 I. & N. Dec. 553, 556 (B.I.A. 2003) (en banc) (citing *Lozada*, 19 I. & N. Dec. at 640).[3]

An alien who complies with these procedural requirements for establishing a claim of ineffective assistance of counsel must also demonstrate that equitable tolling is warranted based on that purported ineffectiveness. See *Singh* v. *Holder*, 658 F.3d 879, 884 (9th Cir. 2011) (noting that compliance with *Lozada*'s procedural requirements is only one aspect of establishing that equitable tolling is warranted). An alien seeking to justify equitable tolling must demonstrate "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Neves* v. *Holder*, 613 F.3d 30, 36 (1st Cir. 2010) (per curiam) (quoting *Pace* v. *DiGuglielmo*, 544

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[3] Any remedy for ineffective assistance of counsel in removal proceedings must be derived from this administrative framework, as aliens have no constitutionally protected right to effective assistance of counsel and thus cannot establish a due process claim based on counsel's ineffectiveness. See, *e.g.*, Br. in Opp. at 16-17, *Merchant* v. *Holder*, 134 S. Ct. 1276 (2014) (No. 13-400); Gov't Br. at 10-12, *Afanwi* v. *Holder*, 558 U.S. 801 (2009) (No. 08-906).

U.S. 408, 418 (2005)), cert. denied, 131 S. Ct. 3025 (2011). Equitable tolling of the 90-day statutory motion to reopen filing deadline is thus available only in narrow and extraordinary circumstances, where the alien can establish ineffective assistance of counsel that was prejudicial to his proceedings and that was discovered as soon as possible through the exercise of due diligence in the pursuit of his claims. See, *e.g.*, *Lawrence* v. *Florida*, 549 U.S. 327, 336 (2007) (requiring extraordinary circumstances to warrant equitable tolling); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (noting that "[f]ederal courts have typically extended equitable relief only sparingly").

b. All of the courts of appeals that have squarely addressed the availability of equitable tolling of the 90-day deadline have held that such tolling is available in appropriate circumstances.[4] The Fifth Circuit has not addressed that issue in a published decision, although it has reached contrary conclusions on the subject in various unpublished decisions.[5] In one of

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[4] See, *e.g.*, *Iavorski* v. *INS*, 232 F.3d 124, 134 (2d Cir. 2000); *Borges* v. *Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005); *Kuusk* v. *Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Barry* v. *Mukasey*, 524 F.3d 721, 724-725 (6th Cir. 2008); *Pervaiz* v. *Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005); *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Valeriano* v. *Gonzales*, 474 F.3d 669 (9th Cir. 2007); *Riley* v. *INS*, 310 F.3d 1253, 1258 (10th Cir. 2002); *Avila-Santoyo* v. *United States Att'y Gen.*, 713 F.3d 1357, 1359 (11th Cir. 2013) (per curiam); see also *Romer* v. *Holder*, 663 F.3d 40, 43 (1st Cir. 2011) (noting that it has not yet issued a precedential decision on the issue).

[5] Compare, *e.g.*, *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (5th Cir. 2008) (per curiam) (rejecting availability of equitable tolling), with *Torabi* v. *Gonzales*, 165 Fed. Appx. 326, 329-331 (5th Cir. 2006) (per curiam) (granting equitable tolling). The petitioner in

those unpublished decisions, *Lin* v. *Mukasey*, 286 Fed. Appx. 148 (5th Cir. 2008) (per curiam), the court explained that "[b]ecause equitable tolling is not a basis for filing an untimely * * * motion under the statute or regulations, [a request for tolling on the basis of ineffective assistance of counsel] is in essence an argument that the [Board] should have exercised its discretion to reopen the proceeding sua sponte based upon the doctrine of equitable tolling." *Id.* at 150. For the reasons explained above, *Lin*'s analysis is mistaken: Equitable tolling of the 90-day deadline for filing a statutorily authorized motion to reopen *is* potentially available in cases where the basis for tolling is the ineffective assistance of counsel. See pp. 13-15, *supra*.

In its published decision in *Ramos-Bonilla*, the Fifth Circuit held that it lacked jurisdiction to review the Board's denial of equitable tolling of the 90-day deadline for filing a motion to reopen. 543 F.3d at 220. It did so by expressly relying upon *Lin*'s (mistaken) holding that a request for equitable tolling of the statutory 90-day deadline is "in essence an argument that the [Board] should have exercised its discretion to reopen the proceeding sua sponte." *Ibid.* (quoting *Lin*, 286 Fed. Appx. at 150). The court reasoned that it lacked jurisdiction because there was no meaningful standard by which it could review the agency's decision denying reopening sua sponte. *Lin*, 286 Fed. Appx. at 150 (citing *Enriquez-Alvarado* v. *Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004)).

Whiteley v. *Holder*, 544 Fed. Appx. 373 (5th Cir. 2013) (per curiam), No. 14-5188, asked this Court to grant certiorari to decide whether the 90-day deadline is subject to equitable tolling. The Court denied certiorari on November 17, 2014.

We agree that a Board decision declining to reopen a removal proceeding sua sponte is not subject to judicial review. See *Kucana* v. *Holder*, 558 U.S. 233, 251 n.18 (2010) (noting court of appeals decisions so holding). But *Ramos-Bonilla*'s jurisdictional analysis lacks merit. It rests on the flawed premise—set forth in *Lin*—that an alien's request for equitable tolling of the 90-day deadline for filing a motion to reopen as authorized by statute must be treated as a request for sua sponte reopening. Instead, the court there should have recognized that equitable tolling of that deadline is available in accordance with the principles adopted by the Board in *Lozada*, *supra*, and *Assaad*, *supra*, and that if tolling is allowed, the alien's motion is timely under 8 U.S.C. 1229a(c)(7). The courts of appeals may exercise jurisdiction to review the denial of a motion to reopen, *Kucana*, 558 U.S. at 253, including a denial based on the Board's determination not to equitably toll the 90-day deadline for such a motion.

In conducting such review, the courts of appeals must apply the traditional abuse-of-discretion standard that, under circuit precedent, governs review of equitable-tolling decisions in other contexts. See, *e.g.*, *Granger* v. *Aaron's, Inc.*, 636 F.3d 708, 712 (5th Cir. 2011); see also *Bead* v. *Holder*, 703 F.3d 591, 593-595 (1st Cir. 2013) (utilizing abuse-of-discretion standard in reviewing denial of equitable tolling); *El-Gazawy* v. *Holder*, 690 F.3d 852, 859-860 (7th Cir. 2012) (same). In applying that standard, courts can review the Board's decision with respect to each of the relevant factors of the equitable tolling analysis, including the procedural requirements for making an ineffective-assistance-of-counsel claim under the Board's decision

in *Lozada* and the standard tolling requirements of diligence and extraordinary circumstances.

Because the court of appeals relied on its flawed analysis in *Ramos-Bonilla*, its dismissal of petitioner's case for lack of jurisdiction was error. The court should have reviewed petitioner's challenge to the Board's decision on the merits. We therefore suggest that the Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand for further consideration in light of the position set forth in this brief concerning the court of appeals' jurisdiction.

2. If the Court does not vacate the judgment below and remand for further consideration of the jurisdictional issue, it should deny the petition for a writ of certiorari because petitioner will not ultimately be able to obtain relief. If the Court does deny certiorari in this case, the government will request that the court of appeals overrule its decision in *Ramos-Bonilla*, in another appropriate case.

a. The Board rejected petitioner's request for cancellation of removal on two independent grounds. See pp. 7-8, *supra*. In addition to holding that petitioner had failed to establish any error in the IJ's conclusion that his conviction was for a crime involving moral turpitude, the Board also determined that petitioner had not established any "exceptional and extremely unusual hardship" to any qualifying relative in the event of petitioner's removal. Pet. App. 8-9. Such hardship is required in order for an alien who is not a lawful permanent resident to establish eligibility for cancellation of removal. 8 U.S.C. 1229b(b)(1)(D). Thus, the Board expressly determined that "*aside from* [*petitioner's*] *ineligibility due to his conviction*,

the motion to reopen does not document that he is eligible for the relief sought." Pet. App. 9 (emphasis added); see generally *INS* v. *Abudu*, 485 U.S. 94, 105 (1988) (holding that the Board may deny a motion to reopen when "the movant would not be entitled to the discretionary grant of relief").

The Board's determination that petitioner did not establish any "exceptional and extremely unusual hardship" to a qualifying relative is independently dispositive of petitioner's motion to reopen. That determination would prevent petitioner from obtaining relief even if he could establish that his prior counsel was ineffective for failing to challenge the Board's classification of his Texas conviction as a crime involving moral turpitude. Notably, petitioner waived any right to review that alternative basis for the Board's denial of his motion to reopen by failing to challenge it on appeal to the Fifth Circuit. See generally Pet. C.A. Br. 5-27; *In re Katima Canal Breaches Litig.*, 620 F.3d 455, 459 n.3 (5th Cir. 2010) (holding that arguments not raised in the opening brief are waived).

b. In addition, petitioner ultimately would not be entitled to equitable tolling because he failed to exercise due diligence in pursuing his ineffective-assistance-of-counsel claim. The record is clear that on September 21, 2012, petitioner was served with a copy of the Board's decision dismissing his administrative appeal for failure to file a brief, a fact that he concedes. A.R. 118, 138. At that point he had 90 days—until December 20, 2012—in which to file a timely motion to reopen. On October 15, 2012, petitioner swore an affidavit indicating that he had already consulted with two new attorneys who had told him that his prior counsel had performed ineffectively

in failing to file an administrative brief. A.R. 118-119. Nonetheless, petitioner did not file his motion until January 14, 2013—over three weeks after expiration of the 90-day filing period. See Pet. App. 6; A.R. 88.

Petitioner cannot establish the requisite due diligence on these facts. To this day, petitioner has not offered a compelling excuse for his untimely filing. His brief to the court of appeals asserted that filing his claim "a mere 115 days" after the Board's denial of his claim "shows due diligence" because petitioner's attorney avoided discussing his case with him on several occasions. Pet. C.A. Br. 14-15. But petitioner received, by mail, the Board's decision dismissing his administrative appeal for failure to file a brief, and petitioner's October 15, 2012 affidavit makes clear that he was aware of the basis for his claim of ineffective assistance of counsel well before the statutory deadline had expired. A.R. 118-119.

In these circumstances, there is no apparent reason why petitioner could not have brought his ineffective-assistance claim before the 90-day statutory deadline. Petitioner's lack of diligence renders him ineligible for equitable tolling, and he would therefore not be able to obtain any benefit from a favorable jurisdictional ruling from this Court on the question presented.

3. As explained above, the government agrees with petitioner that the court of appeals' decision in *Ramos-Bonilla* is erroneous, and it accordingly plans to urge the court of appeals to overrule *Ramos-Bonilla*. In light of the government's position, it seems unlikely that any split of authority between the Fifth Circuit and other circuits on the question presented will persist. See Pet. 21-26 (citing circuit cases). Because the Fifth Circuit may overturn *Ramos-Bonilla* in light of

the government's position—and because petitioner is not ultimately entitled to further relief in his own case—plenary review by this Court is not warranted.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand to the court of appeals for further consideration in light of the position set forth in this brief concerning the court of appeals' jurisdiction. Alternatively, the petition should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOYCE R. BRANDA
Acting Assistant Attorney General
DONALD E. KEENER
PATRICK J. GLEN
Attorneys

NOVEMBER 2014

No. 14-185

IN THE

Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MARK C. FLEMING
SYDENHAM B. ALEXANDER, III
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

RAED GONZALEZ
Counsel of Record
GONZALEZ OLIVIERI LLC
2200 Southwest Fwy.
Suite 550
Houston, TX 77098
(713) 481-3040
rgonzalez@gonzalezolivierillc.com

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

NAIMEH SALEM
SHERIDAN GREEN
EDWIN REYES
GABRIEL GUZMAN
BRUCE GODZINA
GONZALEZ OLIVIERI LLC
2200 Southwest Fwy.
Suite 550
Houston, TX 77098

BRIAN K. BATES
REINA & BATES
123 Northpoint Drive
Suite 190
Houston, TX 77060

ALEXANDRE I. AFANASSIEV
FOSTER QUAN LLP
600 Travis
Suite 2000
Houston, TX 77002

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IN THE

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NOEL REYES MATA,

Petitioner,

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ERIC H. HOLDER, JR.,
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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The government concedes that the Fifth Circuit's decision in this case was incorrect. The Court should grant the petition for certiorari and summarily reverse that decision or set the case for argument.

The Court should reject the government's suggestion of simply vacating and remanding to the Fifth Circuit for further proceedings. The Fifth Circuit has already refused to rehear this case en banc, and the government cannot assure this Court that the Fifth Circuit would proceed any differently now compared to how it proceeded six months ago. Remand to the Fifth Circuit without resolution of the question of that court's appel-

late jurisdiction would consume judicial and party resources without any guarantee that the parties will not be back before this Court raising the same issue.

Even less appropriate is the government's suggestion that the Court should *deny* the petition, thus depriving Mr. Mata of consideration of the merits of his appeal, which the government concedes the Fifth Circuit should have reached. The government's assertion that Mr. Mata is not entitled to relief is the very question that the Fifth Circuit should have addressed; the fact that the government believes it will ultimately prevail on the merits is not a reason to let an erroneous jurisdictional decision stand. Moreover, the government's arguments are misplaced. Before the immigration judge, Mr. Mata sought to present evidence, including testimony from three witnesses, that his U.S. citizen children would suffer exceptional and extremely unusual hardship if he were deported from the United States. The immigration judge refused to hear the testimony, pretermitted Mr. Mata's claim for relief, and ended the hearing based on a legal error—the very legal error that Mr. Mata sought to challenge on appeal, when he was stymied by his prior counsel's ineffectiveness. And contrary to the government's assertion, Mr. Mata diligently filed a motion to reopen through new counsel. It is the Fifth Circuit that should decide these issues in the first instance—not this Court and certainly not the government. We respectfully submit that the petition for certiorari should be granted and the judgment of the Fifth Circuit reversed, either summarily or after merits briefing and argument.

ARGUMENT

THE COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE OR SET THE CASE FOR ARGUMENT

A. Vacatur And Remand Without Resolution Of The Jurisdictional Question Would Unnecessarily Prolong This Case And Consume Court And Party Resources

Mr. Mata welcomes the government's concession of error, as well as its acknowledgement that the Fifth Circuit's position in *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216 (5th Cir. 2008), conflicts with that of the other ten circuits that have considered equitable tolling of the ninety-day filing deadline for motions to reopen immigration proceedings.[1] As the government notes, "*Ramos-Bonilla*'s conclusion that there is no jurisdiction in these circumstances is incorrect, and the court of appeals erred in relying on that precedent." U.S. Br. 12.

However, despite agreeing that the Fifth Circuit erred in concluding that it lacked jurisdiction to hear Mr. Mata's appeal, the government requests the wrong remedy. It argues (Br. 12) that the Court should vacate the judgment and remand this case to the Fifth Circuit so that the government can join a request for rehearing en banc, even though not one member of the court of appeals even requested a poll on rehearing en

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[1] *See Kuusk* v. *Holder*, 732 F.3d 302, 305 (4th Cir. 2013); *Avila-Santoyo* v. *Attorney Gen.*, 713 F.3d 1357, 1362 (11th Cir. 2013); *Valencia* v. *Holder*, 657 F.3d 745, 748-749 (8th Cir. 2011); *Avagyan* v. *Holder*, 646 F.3d 672, 679 (9th Cir. 2011); *Gordillo* v. *Holder*, 640 F.3d 700, 704-706 (6th Cir. 2011); *Luna* v. *Holder*, 637 F.3d 85, 104 (2d Cir. 2011); *Alzaarir* v. *Attorney Gen.*, 639 F.3d 86, 89 (3d Cir. 2011); *Neves* v. *Holder*, 613 F.3d 30, 35 (1st Cir. 2010); *Gaberov* v. *Mukasey*, 516 F.3d 590, 594-597 (7th Cir. 2008); *Riley* v. *INS*, 310 F.3d 1253, 1258 (10th Cir. 2002).

banc when given the opportunity in May of this year. Pet. App. 24-25. The most that the government can offer is the possibility that the Fifth Circuit "may" change its mind if the government says it should. U.S. Br. 20-21 ("[T]he Fifth Circuit *may* overturn *Ramos-Bonilla* in light of the government's position." (emphasis added)).

There is no reason to delay judicial review of the merits of Mr. Mata's appeal by forcing the case through potential en banc reconsideration, given the government's acknowledgment that *Ramos-Bonilla* is on the wrong side of a circuit split. In addition to consuming court and party resources needlessly, such a procedure risks leaving Mr. Mata in a position of having to refile the same petition for certiorari a second time, should the Fifth Circuit decline to rehear the case en banc or reaffirm its erroneous position upon rehearing. Indeed, the Fifth Circuit has already concluded that, in its view, this Court's decision in *Kucana* v. *Holder*, 558 U.S. 233 (2010), did not qualify as an "intervening change in law" warranting deviation from *Ramos-Bonilla*. Pet. App. 3. And since denying Mr. Mata's petition for rehearing six months ago, the Fifth Circuit has continued to rely on *Ramos-Bonilla* in ruling that it lacks jurisdiction to review requests for equitable tolling in the context of motions to reopen. *Singh* v. *Holder*, 2014 WL 5823318, at *1 (5th Cir. Nov. 11, 2014); *Cruz-Chavez* v. *Holder*, 575 F. App'x 365, 365-366 (5th Cir. 2014). Unless this Court reverses the Fifth Circuit's jurisdictional ruling, there is every possibility that that court will continue to adhere to its view, which would require Mr. Mata, after briefing and arguing the matter to the Fifth Circuit again, to petition for certiorari to this Court a second time. The government has shown no reason for following that circuitous and wasteful route.

Mr. Mata respectfully submits that summary reversal would be appropriate in this case. If the Court would prefer to receive further argument regarding the jurisdictional issue, the petition should be granted and the case set for argument, including the potential appointment of an amicus curiae to defend the judgment below if the Court sees fit.

B. The Government's Alternative Arguments For Denial Of Certiorari Are Misplaced

The Court should also reject the government's alternative suggestion that the Court should let the judgment below stand, even though the government concedes the Fifth Circuit should have reached the merits and erroneously refused to do so. The government's arguments for denying Mr. Mata the benefit of the appellate review to which even the government agrees he was entitled all lack merit.

1. The government reassures the Court that it will urge overruling of *Ramos-Bonilla* in "another appropriate case." U.S. Br. 18. But the Fifth Circuit's jurisdiction should not depend on which case the *government* thinks is an "appropriate" one in which to discard an acknowledged jurisdictional error. Rather, it is for the *court* to exercise the appellate jurisdiction that Congress has given it to decide the merits of Mr. Mata's request for equitable tolling. *Cf. Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) (noting "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"). Mr. Mata's claim that the BIA improperly dismissed his request to remain in the United States—his home for the past fourteen years and the home of his three U.S. citizen children—should not be discarded simply because his adversary does not believe that this is an "ap-

propriate" case in which to correct the Fifth Circuit's jurisdictional mistake.

2. The government alternatively argues that, even if the Fifth Circuit orders his case reopened, Mr. Mata would not ultimately prevail on his request for cancellation of removal. U.S. Br. 12. Of course, it is premature for this Court to consider Mr. Mata's ultimate eligibility for cancellation of removal before the Fifth Circuit has addressed the question. Nonetheless, since the government has raised it as a purported basis for depriving Mr. Mata of the right to invoke the Fifth Circuit's appellate jurisdiction, we briefly address the matter.

An applicant for cancellation of removal who is not a lawful permanent resident must show that his or her removal from the United States would cause "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident spouse, parent, or child. 8 U.S.C. § 1229b(b)(1)(D). In this case, however, the immigration judge pretermitted Mr. Mata's application for cancellation of removal and forbade Mr. Mata from presenting any testimony or argument related to hardship. AR189-190.

The "exceptional and extremely unusual hardship" inquiry is highly fact-specific and requires consideration of the cumulative impact of a number of factors. *In re Gonzalez Recinas*, 23 I. & N. Dec. 467, 469-473 (BIA 2002); *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 63-66 (BIA 2001). Relevant factors include the "ages, health, and circumstances" of an applicant's qualifying relatives and the potential impact on those relatives of adverse conditions in the applicant's country of return. *Monreal-Aguinaga*, 23 I. & N. Dec. at 63. They also include the length of time that an applicant and his or

her qualifying relatives have resided in the United States, the qualifying relatives' familiarity with the applicant's country of return (including whether they speak the language), the potential economic consequences of an applicant's removal, and the presence of family members in the United States and in the applicant's country of return. *Gonzalez Recinas*, 23 I. & N. Dec. at 469-472. Factors that relate to the applicant, as opposed to a qualifying relative, may also be considered "to the extent that they affect the potential level of hardship to ... qualifying relatives." *Id.* at 471.

Given the fact-specific nature of this inquiry, an applicant's in-court testimony about his or her particular family circumstances is often especially significant. *See, e.g.*, *Cruz Rendon* v. *Holder*, 603 F.3d 1104, 1109 (9th Cir. 2010) (holding that immigration judge denied applicant a full and fair hearing when judge precluded applicant from testifying about the life she had created for her son in the United States, her son's medical and educational needs, and the hardships her son would face if he were forced to relocate to Mexico). Indeed, in the related context of asylum proceedings, the BIA has noted that an applicant's testimony may be dispositive. *In re Fefe*, 20 I. & N. Dec. 116, 118 (BIA 1989) ("[T]here are cases where an alien establishes eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone.").

Unsurprisingly, the BIA has repeatedly focused on applicant and witness testimony when considering whether an applicant has demonstrated the required level of hardship. *See Gonzalez Recinas*, 23 I. & N. Dec. at 470 (citing applicant's testimony concerning her financial circumstances); *In re Andazola-Rivas*, 23 I. & N. Dec. 319, 320 (BIA 2002) (citing applicant's testimo-

ny concerning her health, the fact that she had no relatives in Mexico who could help her take care of her children, her relationship with the children's father, and the limited educational opportunities for her children in Mexico); *Monreal-Aguinaga*, 23 I. & N. Dec. at 57, 64 (citing applicant's testimony concerning his children's health and the testimony of his twelve-year-old son concerning his language abilities and desire to remain in the United States).

Here, Mr. Mata submitted the birth certificates of his three U.S. citizen children ages ten, nine, and six. AR514-516. Mr. Mata also submitted a proposed witness list, indicating that he planned to call three witnesses in support of his case: his brother-in-law Enrique de Jesus Rodriguez, his sister-in-law Luz Maria White, and his work supervisor Cruz Ramon Arreola. AR518. Each witness planned to testify about his or her relationship with Mr. Mata, Mr. Mata's continuous residence in the United States for ten years (a separate requirement for cancellation of removal), and "the effect of separation if [Mr. Mata] were ordered removed." *Id.*

Nonetheless, after placing Mr. Mata under oath (AR203-204), the immigration judge pretermitted Mr. Mata's application for cancellation of removal because she found that his sole criminal conviction rendered him statutorily ineligible (AR207). The judge explained her decision to Mr. Mata and his prior attorney as follows:

> So what I'm going to do today ... is pretermit [Mr. Mata's] application. I'm not going to listen to any further testimony regarding the other elements of his eligibility for cancellation of removal. What I'm going to do, [is] deny the application.

AR207. Mr. Mata thus never had the opportunity to develop a record regarding the hardship that his removal would cause. The Court should not deprive Mr. Mata of the opportunity to present his case to the Fifth Circuit simply because he did not present evidence that the immigration judge expressly *forbade* him from presenting.

3. Finally, the government asserts that Mr. Mata would not be entitled to equitable tolling because he supposedly did not exercise "due diligence" in pursuing his motion to reopen based on ineffective assistance of counsel. U.S. Br. 19. But the BIA did not rule against Mr. Mata on this basis, either in denying his motion to reopen (AR66-67) or his motion to reconsider (AR3). As a result, the Fifth Circuit *could not* deny Mr. Mata's petition for review on such a ground. *See SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

Putting aside the Fifth Circuit's *inability* to rule against Mr. Mata based on the government's new "diligence" argument, the record does not support the government's assertion in any event. The BIA denied Mr. Mata's initial appeal on September 21, 2012, because his former counsel failed to file a brief. AR139. Contrary to the government's argument (Br. 19), the record does not indicate that Mr. Mata was served with the BIA's notice on September 21. Rather, the record indicates only that the BIA mailed Mr. Mata and his former attorney an English version of the decision *dated* September 21, 2012 (Mr. Mata communicated with the court through a Spanish interpreter throughout his immigration proceedings). AR137-139.

At that point, as the record indicates and the government essentially concedes (Br. 19-20), Mr. Mata moved expeditiously to evaluate his legal options and inquire whether he had a potential ineffective assistance of counsel claim. By October 15, 2012, Mr. Mata had already sought two separate attorneys' opinions concerning whether his former counsel had been ineffective. AR118-119. By October 17, 2012, he had filed a complaint against his former attorney with the Office of Chief Disciplinary Counsel for the State Bar of Texas. AR129-134. And by January 14, 2013, only 115 days after the date of the BIA's decision, Mr. Mata's new counsel moved to reopen the case. AR85. These actions all indicate that Mr. Mata did not "'sleep on his rights,'" but rather sought to reopen his case as soon as he could. *Perez* v. *United States*, 167 F.3d 913, 917 (5th Cir. 1999) (quoting *Burnett* v. *New York Cent. R.R. Co.*, 380 U.S. 424, 429 (1965)).

The government's argument relies not on the premise that Mr. Mata did not move quickly in responding to the BIA's denial of his appeal, but rather on the fact that he did not manage to file his motion to reopen within the ninety-day period. U.S. Br. 20. But as the Ninth Circuit has explained, equitable tolling of the ninety-day period "stops the clock," such that the "tolled" time is subtracted from the filing period. *Socop-Gonzalez* v. *INS*, 272 F.3d 1176, 1195 (9th Cir. 2001) (en banc) (emphasis omitted). Accordingly, the time before Mr. Mata learned that his counsel had been ineffective does not count against him. The government's argument that Mr. Mata knew of the ineffectiveness on October 15, 2012 (Br. 20) thus is not fatal, because ninety days from October 15, 2012 is Sunday, January 13, 2013—placing the due date on the next business day,

Monday January 14, 2013. *See* 8 C.F.R. § 1.2. Mr. Mata's new counsel filed the motion to reopen on that date.

While the Fifth Circuit and the BIA have not yet decided how equitable tolling should function in the context of immigration proceedings, the Ninth Circuit's approach is well-supported and would provide the courts and the BIA with "relative certainty and uniformity" in calculating and applying the statutory period. *See Socop-Gonzalez*, 272 F.3d at 1195 (a contrary approach would promote "inconsistency of application and uncertainty of calculation, thus undermining two of the purposes served by statutes of limitations"). In addition, the Ninth Circuit's approach is well aligned with congressional objectives in providing statutory limitations periods—"to permit plaintiffs to take a specified amount of time (even if they don't 'need it')." *Id.* at 1196.[2]

In sum, however, none of these issues is properly before this Court; only the Fifth Circuit's erroneous jurisdictional ruling is. That ruling prevented the Fifth Circuit from addressing any of the arguments that Mr. Mata or the government raised with respect to the BIA's refusal to reopen his case due to ineffective assistance of counsel. Mr. Mata and the government agree that the jurisdictional ruling cannot stand, and the government's untested challenges to Mr. Mata's merits position are not a reason to leave that jurisdictional error in place.

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[2] The Seventh Circuit has taken a different view. *Yuan Gao v. Mukasey*, 519 F.3d 376, 378 (7th Cir. 2008). Because neither the BIA nor the Fifth Circuit has taken a position on this issue, this Court should not prejudge it by denying certiorari in this case, but rather should leave it to proceedings on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MARK C. FLEMING
SYDENHAM B. ALEXANDER, III
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

BRIAN K. BATES
REINA & BATES
123 Northpoint Drive
Suite 190
Houston, TX 77060

ALEXANDRE I. AFANASSIEV
FOSTER QUAN LLP
600 Travis
Suite 2000
Houston, TX 77002

RAED GONZALEZ
Counsel of Record
GONZALEZ OLIVIERI LLC
2200 Southwest Fwy.
Suite 550
Houston, TX 77098
(713) 481-3040
rgonzalez@gonzalezolivierillc.com

NAIMEH SALEM
SHERIDAN GREEN
EDWIN REYES
GABRIEL GUZMAN
BRUCE GODZINA
GONZALEZ OLIVIERI LLC
2200 Southwest Fwy.
Suite 550
Houston, TX 77098

DECEMBER 2014

No. 14-185

IN THE

Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOINT APPENDIX

DONALD B. VERRILLI, JR.
SOLICITOR GENERAL
Counsel of Record
DEPARTMENT OF JUSTICE
Washington, DC 20530-0001
(202) 514-2217
supremectbriefs@usdoj.gov
Counsel for Respondent

RAED GONZALEZ
Counsel Of Record
GONZALEZ OLIVIERI LLC
2200 Southwest Fwy.
Suite 550
Houston, TX 77098
(713) 481-3040
rgonzalez@
gonzalezolivierillc.com

WILLIAM R. PETERSON
Counsel of Record
BECK REDDEN
1221 McKinney Street
Suite 4500
Houston, TX 77010
(713) 951-6236
wpeterson@beckredden.com
Court-Appointed Amicus Curiae

MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
Counsel for Petitioner

Library of Con
Law Libra

PETITION FOR CERTIORARI FILED AUGUST 14, 2014
CERTIORARI GRANTED JANUARY 16, 2015

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APPENDIX

DOCKET LISTING EXCERPTS UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, NO. 13-60253

NOEL REYES MATA

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL

04/18/2013	IMMIGRATION CASE docketed. Petition for review filed by Petitioner Mr. Noel Reyes Mata. Date received in 5th Circuit: 04/18/2013. Fee due on 05/02/2013 for Petitioner Noel Reyes Mata. Administrative Record due on 05/28/2013 [13-60253] (SBS)
	* * *
05/09/2013	ADMINISTRATIVE RECORD FILED. Electronic Pleadings; Administrative record deadline satisfied. [13-60253] (AGL)
	* * *
07/03/2013	APPELLANT'S BRIEF FILED by Mr. Noel Reyes Mata *Petitioner*. Date of service: 07/03/2013 via email - Attorney for Petitioner: Gonzalez; Attorney for Respondents: Cox, da Rocha-Afodu [13-60253] REVIEWED AND/OR EDITED. # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Appellee's Brief due on 08/05/2013 for Respondent Eric H. Holder, Jr., U.S. Attorney General. Paper Copies of Brief due on 07/08/2013 for Petitioner Noel Reyes Mata. [13-60253] (Raed Gonzalez)

* * *

08/13/2013 1st SUPPLEMENTAL ADMINISTRATIVE RECORD ON APPEAL FILED. Supp Electronic Pldg; Administrative record deadline satisfied. [13-60253] (AGL)

* * *

09/04/2013 APPELLEE'S BRIEF FILED by Respondent Mr. Eric H. Holder, Jr., U.S. Attorney General. Date of service: 09/04/2013 via email Attorney for Petitioner: Gonzalez; Attorney for Respondents: Cox, Fiorino, da Rocha-Afodu [13-60253] REVIEWED AND/OR EDITED. APPELLEE'S BRIEF FILED. # of Copies Provided: 0. E/Res's Brief deadline satisfied. Reply Brief due on 09/23/2013 for Petitioner Noel Reyes Mata. Paper Copies of Brief due on 09/09/2013 for Respondent Eric H. Holder, Jr., U.S. Attorney General. [13-60253] (Paul Fiorino)

* * *

09/23/2013 APPELLANT'S REPLY BRIEF FILED by Mr. Noel Reyes Mata *Petitioner* Date of service: 09/23/2013 via email - Attorney for Petitioner: Gonzalez; Attorney for Respondents: Cox, Fiorino, da Rocha-Afodu [13-60253] REVIEWED AND/OR EDITED. # of Copies Provided: 0. Reply Brief deadline satisfied. Paper Copies of Brief due on 09/30/2013 for Petitioner Noel Reyes Mata. [13-60253] (Raed Gonzalez)

* * *

03/05/2014	UNPUBLISHED OPINION FILED. [13-60253 Affirmed in Part and Dismissed in Part for Lack of Jurisdiction] Judge: RHB , Judge: CH , Judge: SAH. Mandate pull date is 04/28/2014 [13-60253] (JRS)
03/05/2014	JUDGMENT ENTERED AND FILED. [13-60253] (JRS)

* * *

04/17/2014	PETITION filed by Petitioner Mr. Noel Reyes Mata *Petitioner*, for rehearing en banc [7613646-2]. Date of Service: 04/17/2014 via email - Attorney for Petitioner: Gonzalez; Attorney for Respondents: Cox, Fiorino, da Rocha-Afodu [13-60253] (Raed Gonzalez)

* * *

05/16/2014	COURT ORDER denying petition for rehearing en banc filed by Petitioner Mr. Noel Reyes Mata [7613646-2] (IN DETAIL). Without Poll. Mandate pull date is 05/23/2014. [13-60253] (DLJ)
05/27/2014	MANDATE ISSUED. Mandate pull date satisfied. [13-60253] (SBS)

* * *

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A200 723 795 - Houston, TX
Date: [Stamp: SEP 21 2012]

[Stamp: RECEIVED
U.S. DEPARTMENT OF JUSTICE
2013 JAN-4 AM 9:46
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
HOUSTON, TEXAS]

In re: NOEL REYES MATA a.k.a. Alberto Reyes Reyes

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Aseph Almas, Esquire

ON BEHALF OF DHS: John Donovan
Assistant Chief Counsel

APPLICATION: Cancellation of removal under section 240A(b)(1)

The respondent's appeal will be summarily dismissed under the provisions of 8 C.F.R. §§ 1003.1(d)(2)(i)(A) and (E). The Notice of Appeal does not contain statements that meaningfully apprise the Board of specific reasons underlying the challenge

to the Immigration Judge's decision. *See Matter of Lodge*, 19 I&N Dec. 500 (BIA 1987); *Matter of Valencia*, 19 I&N Dec. 354 (BIA 1986).

Additionally, the respondent checked the block on the Notice of Appeal indicating that a separate written brief or statement would be filed in support of the appeal. The Notice of Appeal contains a clear warning that the appeal may be subject to summary dismissal if the appellant indicates that such a brief or statement will be filed and, within the time set for filing, fails to file the brief or statement and does not reasonably explain such failure. The respondent was granted the opportunity to submit a brief or statement in support of the appeal. However, the record indicates that he did not file such brief or statement, or reasonably explain the failure to do so, within the time set for filing. Accordingly, the appeal will be summarily dismissed under the provisions noted above.

ORDER: The respondent's appeal is summarily dismissed.

/s/ [illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Houston, Texas

File A 200 723 795
August 24, 2011
IN REMOVAL PROCEEDINGS

In the Matter of

NOEL REYES MATA,
Respondent

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act, as amended.

APPLICATION: Cancellation of removal for certain unlawful permanent residents pursuant to Section 240A(b)(I) of the Immigration and Nationality Act, as amended.

* * *

ORAL DECISIONAND ORDER OF THE IMMIGRATION JUDGE

I. Introduction

The Department of Homeland Security (DHS) commenced these removal proceedings against respondent on September 21, 2010, charging him with being removable pursuant to the above-captioned section of the Immigration and Nationality Act (Act). The hearings in this matter were conducted in Houston, Texas.

At a master calendar hearing held on January 24, 2011, respondent admitted the factual allegations and conceded removability as charged in the Notice to Appear (NTA). Respondent designated Mexico as the country of removal, should removal become necessary. Based on respondent's admissions and concessions, in addition to the information memorialized in Exhibit 2, the Court found him removable as set forth in the NTA by clear and convincing evidence. As to relief from removal, the respondent applied for cancellation of removal for certain non-lawful permanent residents under Section 240B(a)(1) of the Act. It is respondent's eligibility for such relief that is currently before this Court.

For the reasons set forth below, the Court will deny respondent's cancellation application, Form EOIR-42B as a matter of law.

II. Summary of Evidentiary Record

The record in this case consists of the admission of four Exhibits.

Exhibit 1 is the NTA dated September 15th, 2010. It was filed by DHS on September 21, 2010.

Exhibit 2 is a record of deportable/inadmissible alien, Form 1-213, dated September 15, 2010.

Exhibit 3 consists of criminal records relating to respondent's conviction for Assault-Family Member entered on September 14, 2010. The documents are tabbed A-D.

Exhibit 4 consists of respondent's Form EOIR-42B and supporting documents, tabbed A-E.

All admitted evidence identified above has been considered regardless of whether specifically mentioned in the text of this decision.

III. Factual Background

The facts regarding respondent's criminal history are not in dispute. On or about September 14, 2010, respondent pleaded guilty to, and was convicted for, the Class A misdemeanor of Assault-Family Member. See Exhibit 3, Tabs A-B. His victim was Vanessa Hernandez, an individual identified as a person with whom respondent had a dating relationship.

The criminal court also made an affirmative finding of family violence in connection with the offense. See Exhibit 3, Tab B. Prior to the conviction, respondent was ordered to remain away from Ms. Hernandez for 60 days in connection with the entry of an emergency protective order. See Exhibit 3 Tab C. For the assault offense, respondent was sentenced to 30 days in county jail.

IV. Statement of the Law

A. Cancellation of Removal for Non-Lawful Permanent Residents

The Legal [sic] Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), abolished suspension of deportation under former Section 240A of the Act and replaced it with a restrictive procedure called cancellation of removal, effective April 1, 1997. See IIRIRA Sec. 304(a)(3); INA Sec. 240A(b)(1). As an applicant for cancellation of removal under Section 240A(b)(1) of the Act, an alien must demonstrate: (1) physical presence in the United States for a continuous period of not less than 10 years immediately preceding

the date of application; (2) good moral character during that period; (3) no criminal convictions which are offenses under Section 212(a)(2), 237(a)(2), or 237(a)(3); and, (4) removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent or child who is a United States citizen or lawful permanent resident. The applicant's hardship is no longer considered. INA Sec. 240A(b)(1).

B. Crime Involving Moral Turpitude

The term "moral turpitude" is not defined by the Act and has been described as a nebulous concept by the courts. See, e.g., Matter of Danesh, 19 I&N Dec. 669 (BIA 1988). In identifying conduct that is inherently depraved or intrinsically wrong, courts often look for certain aggravating factors, such as a perpetrator's use of unjustified violence or a deadly weapon, the endangerment of human life or the presence of criminal or evil intent. Fundamental to that determination is whether the Act is accompanied by a vicious motive or a corrupt mind. Hamdan v. INS, 98 F.3d 183, 186 (5th Cir. 1996).

Pursuant to the Attorney General's decision in Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008), this Court must first examine the statutory elements of the conviction under a categorical approach, then, if necessary, consider the record of conviction under a modified categorical approach and can, if necessary, and appropriate, consider evidence beyond the formal record of conviction. The Court may examine documents such as the indictment, the judgment and conviction, jury instructions, assign [sic] guilty plea, and a plea transcript. See Matter of Short, 20 I&N Dec. 135, 137 (BIA 1989); Hyder v. Keisler, 506 F.3d 388, 391 (5th Cir. 2007).

V. Findings of the Court

Inasmuch as respondent's application for cancellation of removal was filed after May 11, 2005, it is governed by the provisions of the REAL ID Act of 2005. See Matter of S-B-, 24 I&N Dec. 42 (BIA 2006). In that regard, respondent fully bears the burden of establishing that he is eligible for the relief that he seeks.

For the reasons set forth below, the Court finds that respondent is statutorily ineligible for cancellation of removal as a matter of law and will pretermit his application. Respondent's conviction for Assault-Family Member is a crime involving moral turpitude, which renders him ineligible for cancellation of removal under Section 240A(b)(1)(C) of the Act.

There is no dispute the respondent pleaded guilty to, and was convicted for, the Class A misdemeanor of assault with an affirmative finding that the victim of the crime was a member of his family. See Exhibit 3, Tabs A-B. Under Section 22.01(a)(1) of the Texas Penal Code, a person commits a Class A misdemeanor if he intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse. Texas Penal Code § 22.01(a)(1). Section 22.01(a)(1) of the Texas Penal Code is divisible, and [sic] that it includes offenses that would be considered crimes involving moral turpitude, as well as offenses that would not. First, it covers simple assaults, which the Board has generally held do not involve moral turpitude. See Matter of Solon, 24 I&N Dec. 239,242 [sic] (BIA 2007); Matter of Fualaau, 21 I&N Dec. 475 (BIA 1996); Matter of Perez-Contreras, 20 I&N Dec. 615 (BIA 1992). Section 22.01(a)(1) also covers assault against a spouse, which the Board has found in some cases to be a crime involving moral turpitude because inflicting harm upon

a family member is of a different, more serious nature than inflicting harm upon a stranger. See Matter of Tran, 21 I&N Dec. 291, 294 (BIA 1996); Matter of Sanudo, 23 I&N Dec. 968, 972 (BIA 2006).

As the state statute at issue here is divisible, the Court must use a modified categorical approach and examine the respondent's record of conviction. See Matter of Silva-Trevino, 24 I&N Dec. 687, 690 (A.G. 2008). Respondent's judgment of conviction indicates that the presiding judge made an affirmative finding of family violence. See Exhibit 3, Tab B, Page 3. Additionally, the criminal information to which respondent pleaded guilty indicates that respondent did unlawfully, intentionally, and knowingly cause bodily injury to Vanessa Hernandez, a person with whom he had a dating relationship, by striking her with his foot and grabbing her with his hand. Under Texas law, a family member is defined, inter alia, as a person in a dating relationship. See Tex. Penal Code Ann. Section 22.01(b)(2) (West Supp. 2010); Tex. Fam. Code Ann. Section 71.0021(b), 71.003, 71.005(West 2010). Texas law further defines a dating relationship as a relationship between individuals who have or have had a continuing relationship of a romantic or intimate nature. It does not include a casual acquaintance in a business or social context. Tex. Fam. Code Ann. Section 71.0021(b)-(c).

The Court finds that the respondent's intentional acts of striking or grabbing another with whom he has a close, personal relationship and causing a physical injury is morally reprehensible and necessarily involves turpitudinous conduct, and thus is a crime involving moral turpitude. See Matter of Tran, 21 I&N Dec. at 294; Matter of Sanudo, 23 I&N Dec. at 972. Under Texas law, the maximum punishment for a Class A misdemeanor is one year. See Tex. Penal Code Section 12.21(2).

The dispositive issue then becomes whether or not such conviction is described under Section 212(a)(2), 237(a)(2) or 237(a)(3) of the Act, thereby rendering the respondent ineligible for cancellation of removal. See INA Sec. 240A(b)(1)(C). The Board clarified the analysis required in order to determine this question of law in recent precedent decisions. See Matter of Cortez, 25 I&N Dec. 301 (BIA 2010); Matter of Pedroza, 25 I&N Dec. 312 (BIA 2010). In Cortez, the Board explained that in order to determine if a crime involving moral turpitude is described under Sections 212(a)(2), 237(a)(2) or 237(a)(3) of the Act, only language specifically pertaining to the criminal offense, such as the offense itself, and sentence imposed or potentially imposed, should be considered. Matter of Cortez, 25 I&N Dec. 307. The Board further explained that statutory language relating only to aspects of Immigration Law, such as the requirement under Section 237(a)(2) that an offense be committed within five years after the date of admission is not to be considered in the crime involving moral turpitude analysis. The Board concluded that in order for an offense to be described under Section 237(a)(2)(A)(i) of the Act and render a respondent ineligible for cancellation, the crime must be a crime involving moral turpitude and must be punishable by a sentence to imprisonment for a year or longer. Matter of Cortez, 25 I&N Dec. at 307.

In light of Board precedent, this Court concludes that respondent has been convicted of an offense described under Section 237(a)(2) of the Act, a crime involving moral turpitude for which a sentence of one year or longer may be imposed and is thus ineligible for relief of cancellation of removal. Furthermore, the question of whether respondent's conviction qualifies for a petty offense exception under 212(a)(2)(A)(ii)(II)

of the Act need not be determined, because regardless of the results of such inquiry, the conviction remains an offense described under Section 237(a)(2). Therefore, the Court further concludes that respondent's conviction for assault to a family member renders him ineligible for cancellation of removal.

Respondent has not identified any other form of relief. The circumstances in these proceedings leave no alternative except to issue an order of removal to respondent's native country of Mexico.

VI. Conclusion and Orders

For the reasons discussed, the following orders will enter:

ORDER

IT IS HEREBY ORDERED that respondent's application for cancellation of removal for certain nonpermanent residents under Section 240A(b) of the Immigration and Nationality Act, as amended, is pretermitted and denied as a matter of law.

IT IS FURTHER ORDERED that respondent shall be removed to Mexico on the charge specified in the Notice to Appear, dated September 15, 2010.[1]

Appeal due September 23, 2011.

Date: August 24, 2011.

/s/ Lisa Luis
LISA LUIS
Immigration Judge

[1] Respondent will be advised of his appeal rights separately on the record.

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court

File A 200 723 795
IN REMOVAL PROCEEDINGS
Transcript of Hearing

Matter of

NOEL REYES MATA,
Respondent

Before LISA LUIS, Immigration Judge

Date: August 24, 2011 Place: Houston, Texas

* * *

JUDGE FOR THE RECORD

Okay. We're on the record. It is now, it's Wednesday, August 24th, 2011. This is Immigration Judge Lisa Luis, sitting in Houston, Texas. And this is a continued removal proceeding in the matter of Noel Reyes Mata, A number 200 723 795. Respondent is present in court and is represented.

JUDGE TO COUNSEL

Q. Counsel, please state your appearances.

A. (Mr. Almas) Aseph Almas for the respondent.

A. (Mr. Donovan) John Donovan, D-O-N-O-V-A-N, for the Government.

Q. All right, good afternoon, Mr. Almas and Mr. Donovan.

JUDGE TO MR. ALMAS

Q. Mr. Almas, what language does your client speak and understand the best?

A. Spanish.

Q. Our Spanish interpreter today is Ms. Esmin Tate, she's an employee with the Department of Justice.

JUDGE TO MR. REYES

Q. To the respondent through the interpreter, sir, what is your name?

A. Noel Reyes Mata.

Q. All right, sir. Please stand and raise your right hand. Do you swear or affirm that the testimony you provide in these proceedings will be the truth, the whole truth, and nothing but the truth?

A. Yes.

Q. All right. Please take your seat.

JUDGE TO MR. ALMAS

Q. Mr. Almas, we're here to address the respondent's application for cancellation of removal for non-lawful permanent residents. After the last hearing, the Government filed some Exhibits tabbed A through D regarding a criminal conviction record for assault on a family member. Did you receive those?

A. Yes, Your Honor.

Q. All right. Any objection?

A. No, Your Honor.

Q. This entire packet will be admitted as Exhibit 3. We're going to give you the respondent's application for cancellation of removal. Please look it over, have

him look it over and make any necessary amendments and then sign and date.

JUDGE TO MR. REYES

Q. Sir, I am returning your application for cancellation of removal. Please look it over and make any necessary amendments.

A. (No audible response.)

JUDGE TO MR. DONOVAN

Q. The background checks complete and current, Mr. Donovan?

A. Correct.

Q. I don't believe I have an order for this one. I don't see (indiscernible). Our interpreter stepped out for just a moment.

JUDGE FOR MR. ALMAS

Q. While we wait for her, Mr. Almas, I've looked over the conviction records provided by the Government and it seems to me the respondent has a problem here in that his conviction for assault with an affirmative finding of the victim being a family member, appears to me to be a CIMT that would preclude him from cancellation of removal. Is there any issue that this is a conviction record that relates to him?

A. No, Your Honor. That conviction relates to him.

Q. All right. Is there any issue that as far as the dates of the judgment, here it shows September 14th, 2010, yes, September 14th, 2010 that it's a Class A misdemeanor?

A. No. There's no issue.

Q. And that he pled guilty to the information that's attached at Tab A?

A. No, Your Honor, he did plead guilty.

Q. All right. So that's not an issue at all and that he received 30 days, a 30-day sentence for the offense.

A. Yes. The only issue that he made to me and I indicated to him that's not going to be relevant, that his wife signed an affidavit of non-prosecution and gave that to the district attorney's office, however, the District Attorney went forward with the case and he pled guilty.

Q. Okay.

A. So I indicated to him that's not going to be an issue.

Q. Okay.

A. In the court.

Q. All right. All right.

JUDGE TO MR. REYES

Q. Through the interpreter to the respondent, sir, you've had a chance to review your application for cancellation of removal. And has anyone explained to you the contents of this application in a language you understand?

A. This application now?

Q. Yes.

A. Yes.

Q. And do you swear under penalty of perjury that all the information contained in the application along with all of the documentation attached to it is true and correct?

A. Yes.

Q. All right.

JUDGE TO MR. DONOVAN

Q. Mr. Donovan, any objections to the application for cancellation of removal along with Tabs A through E?

A. No.

Q. All right. This will be admitted as Exhibit 4. All right.

JUDGE TO MR. ALMAS

Q. Back to the issue of the criminal conviction, Mr. Almas. So his criminal history is not in dispute at all as presented in his conviction records that the Government has filed, correct?

A. Right.

Q. All right. Well, I don't believe he's eligible at this point for cancellation of removal.

JUDGE TO MR. DONOVAN

Q. Mr. Donovan, do you want to be heard on this?

A. Well, we agree with the Court, Your Honor.

Q. Okay.

JUDGE TO MR. ALMAS

Q. So what I'm going to do today, Mr. Almas, is pretermit his application. I'm not going to listen to any further testimony regarding the other elements of his eligibility for cancellation of removal. What I'm going to do, deny the application. Is there any other form of relief that he's seeking?

A. (Mr. Almas) No, Your Honor.

A. (Mr. Donovan) None at all.

Q. And no post-hearing voluntary departure. Is that correct?

A. (Mr. Almas) That's correct.

Q. Okay. All right.

JUDGE TO MR. REYES

Q. To the respondent through the interpreter, sir, I've reviewed the criminal conviction records that the Government has filed in your case. And it is my opinion that your conviction for assault on a family member is sufficient to preclude you from showing eligibility for cancellation of removal. And as your attorney has explained to me, the conviction record itself and the facts of conviction are not in dispute. And I'm going to deny your application as a matter of law, and in a few moments, I'm going to issue an oral decision explaining in detail why I believe you do not qualify for that form of relief. When I finish with that decision, I will come back to you and I will explain to you your rights to appeal my decision.

JUDGE RENDERS ORAL DECISION

JUDGE TO MR. ALMAS

Mr. Almas, Mr. Donovan, you've heard the Court's decision denying the respondent's application for cancellation of removal as a matter of law. Mr. Almas, do you reserve your client's right to appeal?

A. Yes.

Q. And Mr. Almas, let me just remind you again that the appeal will be due at the Board of Immigration Appeals no later than September 23rd, 2011.

JUDGE TO MR. DONOVAN

Q. Mr. Donovan, do you waive or reserve the Government's right to appeal?

A. Waive, Your Honor.

JUDGE TO COUNSEL

Q. All right. Mr. Almas and Mr. Donovan, I have the summary orders here. Just let me know if you have any issues or concerns as to the (indiscernible) order.

JUDGE TO MR. REYES

Q. To the respondent through the interpreter, sir, I have just finished rendering an oral decision, denying your application for cancellation and ordering you removed from the United States to Mexico. You have an absolute right to appeal my decision, in fact, your attorney has already reserved your right to appeal.

Now, to perfect your appeal, you have to file a notice of appeal on a document called an EOIR-26 and you have to file that with the Board of Immigration Appeals, that is a higher court, no later than 30 calendar days from today's date. That means that the Board of Immigration Appeals has to receive your appeal no later than September 23rd, 2011. You may obtain the appeal forms and the written instructions at the administrative section of this court. Now, if the time period expires and you do not file an appeal then my decision will become final. You may continue to have legal representation on appeal, but without expense to the United States Government. And if you cannot afford the fees on appeal, you may request the Board of Immigration Appeals to waive those fees and they will consider your request. Do you have any questions about your appeal rights, sir?

A. No.

Q. All right. Do you have any questions about anything else in your case before we conclude today?

A. Could I try to reopen my criminal case?

Q. That's something that you need to talk to your lawyers about, sir. I don't have any jurisdiction over your criminal case. Any other questions?

A. (No audible response.)

Q. No.

JUDGE TO MR. ALMAS

Q. Mr. Almas, any concerns as to the form of the summary order?

A. No.

Q. All right. Anything further?

A. No.

JUDGE TO MR. DONOVAN

Q. Mr. Donovan, any concerns as to the form of the order?

A. None.

Q. All right. Anything else from DHS?

A. Nothing else, Your Honor.

JUDGE FOR THE RECORD

All right. That brings this matter to conclusion.

MR. ALMAS TO JUDGE

Q. Thank you, Your Honor.

HEARING CLOSED

No. 14-185

SUPREME COURT, U.S.
FILED
FEB 27 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

MARK C. FLEMING
SYDENHAM B. ALEXANDER, III
NICOLE FONTAINE DOOLEY
JEFFERY A. HABENICHT
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

JASON D. HIRSCH
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

CLAIRE M. BERGERON
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

RAED GONZALEZ
Counsel of Record
NAIMEH SALEM
SHERIDAN GREEN
BRUCE GODZINA
GONZALEZ OLIVIERI LLC
2200 Southwest Fwy.
Suite 550
Houston, TX 77098
(713) 481-3040
rgonzalez@gonzalezolivierillc.com

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Law Library

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BRIAN K. BATES
REINA & BATES
123 Northpoint Drive
Suite 190
Houston, TX 77060

ALEXANDRE I. AFANASSIEV
QUAN LAW GROUP
544 Westheimer Street
Suite 1750
Houston, TX 77056

QUESTION PRESENTED

Whether the court of appeals has jurisdiction to review the Board of Immigration Appeals' decision denying a request for equitable tolling of the 90-day statutory period for filing a motion to reopen removal proceedings as a result of ineffective assistance of counsel.

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IN THE

Supreme Court of the United States

No. 14-185

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

INTRODUCTION

Congress has provided the federal courts of appeals with jurisdiction to review final orders of removal, including the denial of motions to reopen removal proceedings under 8 U.S.C. § 1229a(c)(7). Yet the Fifth Circuit has declined to exercise its appellate jurisdiction with regard to a particular subcategory of motions to reopen, namely those accompanied by a request for equitable tolling of the 90-day filing period for such a motion. 8 U.S.C. § 1229a(c)(7)(C)(i). No other circuit shares that approach, which cannot be reconciled with the governing statute, with this Court's decision in *Kucana* v. *Holder*, 558 U.S. 233 (2010), with the well-established presumption in favor of judicial review of

administrative decisions, or with the law of equitable tolling generally. The Court should reverse the Fifth Circuit's judgment and remand for consideration of the merits of Mr. Mata's petition for review.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported. The order of the court of appeals denying rehearing and rehearing en banc (*id.* 24-25) is unreported. The decision of the Board of Immigration Appeals (BIA) summarily dismissing Petitioner's appeal (JA4-5) is unreported. The decisions of the BIA denying Petitioner's motion to reopen (Pet. App. 6-9) and motion for reconsideration (*id.* 4-5) are unreported. The decision and order of the immigration judge (JA6-13; Pet. App. 21-23) are unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals entered judgment on March 5, 2014 (Pet. App. 1), and denied a timely petition for rehearing on May 16, 2014 (*id.* 24-25). The petition for certiorari was filed on August 14, 2014, and granted on January 16, 2015.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reprinted in the appendix to this brief.

STATEMENT

A. Background Regarding Motions To Reopen Removal Proceedings

In 1996, Congress amended the Immigration and Nationality Act (INA) to provide that a noncitizen who is ordered removed is entitled to file one motion asking the immigration judge or BIA to reopen the removal proceedings. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-546, 3009-593 (IIRIRA) (codifed as amended at 8 U.S.C. § 1229a(c)(7)); *see also Dada* v. *Mukasey*, 554 U.S. 1, 14 (2008) (IIRIRA "transform[ed] the motion to reopen from a regulatory procedure to a statutory form of relief available to the alien").

The statutory motion to reopen "is a form of procedural relief that 'asks the Board to change its decision in light of newly discovered evidence or a change in circumstances since the hearing.'" *Dada*, 554 U.S. at 12; *see also Kucana* v. *Holder*, 558 U.S. 233, 248 (2010) ("The motion to reopen is a procedural device serving to ensure 'that aliens are getting a fair chance to have their claims heard.'" (alterations omitted)). As this Court has recognized, statutory motions to reopen stand as an "important safeguard" in the removal process, *Dada*, 554 U.S. at 18, and were "intended 'to ensure a proper and lawful disposition' of immigration proceedings," *Kucana*, 558 U.S. at 242 (quoting *Dada*, 554 U.S. at 18).

A motion to reopen must ordinarily be filed within 90 days of the date of entry of a final administrative removal order. 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. § 1003.2(c)(2); *see also* 8 U.S.C. § 1101(a)(47)(B) (providing that a removal order becomes final upon affirmance

by the BIA or expiration of the period for seeking BIA review). As explained by the BIA and the United States in this case, as well as every court of appeals to have decided the question, the statutory filing period governing motions to reopen is subject to equitable tolling. Pet. App. 7 (BIA decision) ("the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel"); U.S. Cert. Br. 13; *see also, e.g.*, *Kuusk* v. *Holder*, 732 F.3d 302, 305 (4th Cir. 2013). The BIA's decision in *Matter of Lozada*, 19 I. & N. Dec. 637, 639 (1988), sets forth the BIA's requirements for a claim of ineffective assistance of counsel: (1) an affidavit from the noncitizen attesting to the relevant facts and detailing his or her agreement with former counsel and what former counsel did and did not represent to the client; (2) an indication that former counsel was informed of the allegations and allowed an opportunity to respond; and (3) a statement whether a complaint was filed with the appropriate disciplinary authorities or, if no complaint was filed, an explanation why not. The movant must also show that he or she was prejudiced by former counsel's conduct. *Id.* at 638. And when a motion to reopen is joined with a request for equitable tolling due to ineffective assistance of counsel, the movant must show diligent pursuit of his or her rights. *E.g.*, *Matter of Moreta-Verdezoto*, 2008 WL 4066031, at *1 (BIA Aug. 4, 2008) (per curiam) ("The motion will be granted because the respondent meets the requirements to allege ineffective assistance of counsel, shows prejudice, and shows due diligence so that equitable tolling of the time limitation on motions to reopen is warranted.").[1]

---

[1] This Court has stated that a movant seeking equitable tolling must show "that some extraordinary circumstance stood in his

B. Proceedings Before The Immigration Judge

Petitioner Noel Reyes Mata, a citizen of Mexico, has lived in the United States for almost 15 years. Administrative Record (AR) 214-215. He is the father of three native-born U.S. citizen children, ages 10, 9, and 6. AR514-516. Mr. Mata currently works as a welder (AR216) and supports his three children (AR119).

On September 15, 2010, the government initiated removal proceedings against Mr. Mata by filing a Notice to Appear. AR562. Mr. Mata retained an attorney to represent him in the removal proceedings. AR118.

1. Mr. Mata's proceedings before the immigration judge consisted of two hearing days. On January 24, 2011, counsel conceded Mr. Mata's removability, but informed the court that Mr. Mata would be seeking cancellation of removal. Pet. App. 11; *see* 8 U.S.C. § 1229b(b)(1) (allowing an immigration judge to "cancel") the removal of a nonpermanent resident and adjust the person's status to that of a lawful permanent resident). To be eligible for this relief, the noncitizen must establish: (1) continuous presence in the United States for 10 years or more; (2) good moral character during that time; (3) no conviction of certain criminal offenses, including "crime[s] involving moral turpitude";[2] and (4) that his removal would result in excep-

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way," *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005), and that "professional misconduct" of counsel may "amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling," *Holland* v. *Florida*, 560 U.S. 631, 651 (2010).

[2] 8 U.S.C. § 1229b(b)(1)(C) cross-references 8 U.S.C. § 1182(a)(2), which describes "[c]riminal and related" grounds of inadmissibility, including conviction for "a crime involving moral

tional or extremely unusual hardship to a U.S. citizen or lawful permanent resident spouse, parent, or child. 8 U.S.C. § 1229b(b)(1).

Mr. Mata claimed eligibility based on satisfaction of all four factors. The government asserted that Mr. Mata was ineligible for relief because he had pled guilty under Texas Penal Code § 22.01(a)(1) to misdemeanor assault on "a person with whom [Mr. Mata] had a dating relationship" (Pet. App. 12-15)—a conviction for which Mr. Mata received a sentence of 30 days' imprisonment (AR526).

The immigration judge asked Mr. Mata's counsel whether the misdemeanor conviction was a disqualifying crime involving moral turpitude. AR197. Counsel responded that it was not and that he would file a brief addressing this issue. AR197-198.

Despite his promise to the court and his client, counsel never filed a brief explaining why Mr. Mata's conviction was not for a crime involving moral turpitude, nor did he develop the argument orally during the two days of hearings.

2. The second day of Mr. Mata's immigration hearing occurred eight months later on August 24, 2011. AR203. Prior to this hearing date, counsel filed Mr. Mata's required application for cancellation of removal, which included a proposed witness list of individuals whom Mr. Mata planned to call to testify at the hearing, including his brother-in-law, Enrique de Jesus Rodriguez; his sister-in-law, Luz Maria White; and his work supervisor, Cruz Ramon Arreola. AR518-519. These witnesses would testify about, among other

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turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime." 8 U.S.C. § 1182(a)(2)(A)(i)(I).

things, Mr. Mata's continuous residence in the United States for 10 years and "the effect of separation if [Mr. Mata] were ordered removed." AR518. Mr. Mata himself expected to testify as well.

Although the immigration judge began the hearing by placing Mr. Mata under oath (JA15), neither he nor any other witness was allowed to testify. Instead, the judge had a brief colloquy with counsel, during which the judge confirmed that Mr. Mata did not dispute that the criminal record submitted by the government was in fact Mr. Mata's. JA16. The judge then decided to "pretermit" Mr. Mata's request for relief and order him removed, explaining:

> So what I'm going to do today, [counsel], is pretermit his application. I'm not going to listen to any further testimony regarding the other elements of his eligibility for cancellation of removal. What I'm going to do, [is] deny the application.

JA18. The decision to pretermit was made after the court accepted Mr. Mata's application for cancellation of removal and supporting documentation, but before Mr. Mata had introduced any additional evidence—oral or documentary—in support of his claim. JA15-18.

In her decision denying Mr. Mata's application for cancellation of removal, the immigration judge concluded that Mr. Mata was not eligible for cancellation because, in the judge's view, his conviction was for a crime involving moral turpitude. JA11-13. In assessing that issue, the judge (JA9) relied on *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), which established a three-part framework for determining whether a criminal offense was a crime involving moral turpitude, requiring judges to: (1) conduct a categorical

analysis of the relevant statute; (2) if necessary, use a modified categorical approach and examine the person's record of conviction; and (3) "[w]hen the record of conviction is inconclusive," and "to the extent they deem it necessary and appropriate," to consider evidence outside the formal record of conviction. *Id.* at 689-690. The Fifth Circuit later vacated the *Silva-Trevino* decision, holding that the third step of the framework was "inconsistent with the unambiguous language of the relevant statutory provision." *Silva-Trevino* v. *Holder*, 742 F.3d 197, 198 (5th Cir. 2014).[3] The immigration judge did not assess Mr. Mata's claim under the other three elements of Section 1229b(b)(1), as to which no evidence had been permitted during the hearing.

C. Proceedings Before The BIA

1. On September 2, 2011, counsel noticed Mr. Mata's appeal to the BIA. AR173-176. On the second page of the notice, counsel checked a box indicating that he would subsequently file a written brief or statement. AR174. Counsel subsequently received two notices from the BIA including written warnings that Mr. Mata's case could be summarily dismissed if he failed to file a brief. AR160; AR168; *see also* 8 C.F.R.

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[3] Other circuits have likewise rejected the *Silva-Trevino* framework. *See Olivas-Motta* v. *Holder*, 746 F.3d 907, 908 (9th Cir. 2013); *Prudencio* v. *Holder*, 669 F.3d 472, 476 (4th Cir. 2012); *Fajardo* v. *U.S. Att'y Gen.*, 659 F.3d 1303, 1311 (11th Cir. 2011); *Jean-Louis* v. *U.S. Att'y Gen.*, 582 F.3d 462, 470 (3d Cir. 2009). Moreover, the framework has been further undermined by this Court's decisions in *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013) (noting that, in using the categorical approach, "we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized") and *Descamps* v. *United States*, 133 S. Ct. 2276, 2283, 2286 (2013) (noting that the modified categorical approach "serves a limited function").

§ 1003.1(d)(2)(i)(E) (the BIA may summarily dismiss an appeal when "[t]he party concerned indicates ... that he or she will file a brief or statement in support of the appeal and, thereafter, does not file such brief or statement, or reasonably explain his or her failure to do so"). Despite these warnings, counsel never filed a brief for Mr. Mata in the BIA. AR139; JA4-5.

On September 21, 2012, the BIA summarily dismissed Mr. Mata's appeal. JA4-5. The decision explained that counsel's notice of appeal did not "contain statements that meaningfully apprise the Board of specific reasons underlying the challenge to the Immigration Judge's decision" and that no brief had ever been filed. *Id.*

2. The BIA sent Mr. Mata its decision by mail.[4] AR138. Mr. Mata then began to assess his legal options and sought out new counsel. AR118-119. By October 15, 2012, roughly three weeks after the date of the BIA's notice denying his appeal, Mr. Mata had consulted with two attorneys who informed him that his former attorney "neglected [his] case by failing to file an appeal brief." AR118, 134. By October 17, 2012, Mr. Mata had filed a complaint against his former attorney with the State Bar of Texas. AR129-134. The Texas Office of Chief Disciplinary Counsel later investigated Mr. Mata's former counsel and found that there was just cause to believe that he had committed an act of professional misconduct under the Texas Rules of Disciplinary Procedure by failing to file a brief in Mr. Mata's case. AR57-58.

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[4] The English-language decision was sent to Mr. Mata's home. Mr. Mata does not read English and only communicated with the immigration court through a Spanish interpreter. JA15.

3. On January 14, 2013, 115 days after the BIA issued its decision summarily denying his appeal and 25 days after the 90-day period had elapsed, Mr. Mata—represented by new counsel—moved in the BIA to reopen his removal proceedings. Pet. App. 6. The motion sought reopening under the standards set forth by the BIA in *Lozada*, 19 I. & N. Dec. at 639, because his prior counsel had been ineffective. Pet. App. 7. Mr. Mata submitted the documentation required by *Lozada*, including an affidavit stating that he had hired his former attorney but that counsel had never filed a brief in support of Mr. Mata's appeal, AR118-120; a letter to former counsel alleging ineffective assistance in Mr. Mata's case, AR122-123; former counsel's response to that letter, AR125-127; and documentation showing that Mr. Mata had filed a grievance with the State Bar of Texas, AR129-135. Mr. Mata further asserted that, by virtue of ineffective representation, he "was not able to challenge the Government allegations and appeal his case to the BIA." AR91.

The BIA denied Mr. Mata's motion to reopen on March 22, 2013, finding that it was untimely because it was filed 25 days outside the 90-day statutory period. Pet. App. 6-9; *see* 8 U.S.C. § 1229a(c)(7)(C)(i). As an initial matter, the Board acknowledged that the 90-day filing period "may be tolled in cases of ineffectiveness of counsel." Pet. App. 7. Nevertheless, the Board declined to apply equitable tolling because it believed Mr. Mata failed to show that he was prejudiced by former counsel's failure to submit a brief. *Id.* 7-8.

Mr. Mata moved to reconsider the BIA's denial of the motion to reopen. Pet. App. 4. Mr. Mata noted that he had been prejudiced by former counsel's ineffective assistance, which deprived him of the opportunity to

have the BIA consider the merits of his appeal. AR13. The BIA denied reconsideration. Pet. App. 4-5.

D. Court Of Appeals Proceedings

Pursuant to 8 U.S.C. § 1252, Mr. Mata petitioned the United States Court of Appeals for the Fifth Circuit for review of the BIA's decisions. Pet. App. 2. As relevant here, Mr. Mata argued that the BIA should have applied equitable tolling based on his ineffective-assistance-of-counsel claim. Pet. C.A. Br. 7. In response, the government noted that, under circuit precedent, a BIA decision denying equitable tolling of the period to file a motion to reopen due to ineffective assistance of counsel was "beyond the court's jurisdiction." Resp. C.A. Br. 18 (citing *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008)). In reply, Mr. Mata argued that *Ramos-Bonilla*, which addressed jurisdiction to review pre-IIRIRA regulatory reopening of deportation proceedings, had been undermined by this Court's jurisdictional ruling in *Kucana* v. *Holder*, 558 U.S. 233 (2010), which addressed post-IIRIRA statutory reopening of removal proceedings. Pet. C.A. Reply Br. 9. Mr. Mata also pointed out (*id.* 4-6) that this Court's recent guidance in *Descamps* v. *United States*, 133 S. Ct. 2276 (2013), reinforced his substantive position that the immigration judge erred in treating his conviction as a crime involving moral turpitude.

The Fifth Circuit dismissed Mr. Mata's appeal for lack of jurisdiction. Pet. App. 1-3. Citing *Ramos-Bonilla*, the court stated that it construes requests for equitable tolling based on ineffective assistance of counsel as requests that the BIA exercise its regulatory authority to reopen proceedings *sua sponte* under 8

C.F.R. § 1003.2(a).[5] *Id.* 2-3. The court reasoned that it lacked a "meaningful standard [of review] against which to judge" the BIA's denial of Mr. Mata's request for equitable tolling. *Id.* The court also ruled that *Kucana* did not compel a different outcome. *Id.* 3. Mr. Mata petitioned for rehearing en banc, pointing out that the Fifth Circuit's jurisdictional ruling diverges from that of every other circuit to have considered the issue. Pet. for Reh'g iv-v. The Fifth Circuit denied rehearing. Pet. App. 24-25.

In response to Mr. Mata's petition for certiorari, the government acknowledged that it "agrees with petitioner that the court of appeals erred in denying his petition for review for lack of jurisdiction under *Ramos-Bonilla* v. *Mukasey*." U.S. Cert. Br. 11. It further noted that "[t]here are adequate standards to be applied by a court of appeals in reviewing Board decisions rejecting arguments for equitable tolling based on ineffective assistance of counsel." *Id.* 12.

This Court granted certiorari and appointed an amicus curiae to defend the Fifth Circuit's judgment.

SUMMARY OF ARGUMENT

A. Congress defines the jurisdiction of the federal courts of appeals, and it has clearly authorized them to hear petitions for review of final orders of removal, including denials of motions to reopen removal proceedings. 8 U.S.C. § 1252(a)(1), (b)(6). Recently, this Court

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[5] The BIA has held that it may reopen a case *sua sponte* in "exceptional situations" (*Matter of Beckford*, 22 I. & N. Dec. 1216, 1218 (BIA 2000)), including in "unique situations where it would serve the interest of justice" (*Matter of X-G-W-*, 22 I. & N. Dec. 71, 73 (BIA 1998), *superseded on other grounds by Matter of G-C-L-*, 23 I. & N. Dec. 359 (BIA 2002)).

recognized that, following IIRIRA's codification of the motion to reopen as a statutory remedy, "[a]ction on motions to reopen ... remain[s] subject to judicial review." *Kucana* v. *Holder*, 558 U.S. 233, 253 (2010). That ruling applied the established presumption favoring judicial review of administrative decisions, which applies equally to the BIA's decision on Mr. Mata's motion to reopen.

There is no reason to accord different treatment to the subcategory of denials of motions to reopen at issue here, namely those that rest on a refusal to apply equitable tolling to the 90-day limitation period of 8 U.S.C. § 1229a(c)(7)(C)(i). Equitable tolling is presumptively implied in such statutory time periods, and the 90-day period is a nonjurisdictional "claim processing" rule that is indistinguishable from other provisions this Court has ruled are subject to equitable tolling. Indeed, no court of appeals has held that the 90-day period cannot be equitably tolled, and the Fifth Circuit is the only one to have concluded that its jurisdiction to review decisions denying motions to reopen somehow excludes review of equitable tolling determinations.

B. The Fifth Circuit's reasons for its lone position do not withstand scrutiny. The court "construes" requests for equitable tolling, including those on the basis of ineffective assistance of counsel, as requests for the BIA to reopen the removal proceeding *sua sponte*. That is error. A *statutory* motion filed under 8 U.S.C. § 1229a(c)(7) does not invoke the BIA's *regulatory* authority to reopen the case *sua sponte*. And when a statutorily authorized motion invokes the equitable tolling doctrine, it simply asks that the failure to comply with the 90-day period of 8 U.S.C. § 1229a(c)(7)(C) be excused for equitable reasons, such that a facially late motion is treated as timely under the statute.

The Fifth Circuit is also incorrect in suggesting that there is no meaningful standard that it can apply in reviewing a decision denying equitable tolling. The application of equitable tolling is the subject of settled standards, and the BIA's own *Lozada* decision provides standards for ineffective assistance of counsel—all of which are frequently applied by reviewing courts, including the Fifth Circuit. This also demonstrates that, even if Mr. Mata's motion were considered a request for *sua sponte* reopening (which it is not), the court of appeals would still have authority to review it because the agency has established a settled course of adjudication with respect to ineffective assistance of counsel claims, thus permitting ample basis for review.

The Fifth Circuit's judge-made exception to its own appellate jurisdiction is unsupported and should be reversed.

ARGUMENT

THE COURT OF APPEALS HAS JURISDICTION TO REVIEW THE BIA'S EQUITABLE TOLLING DETERMINATION

A. Congress Conferred Jurisdiction On The Courts Of Appeals To Review BIA Decisions Refusing To Reopen Removal Orders, Including Refusals Of Equitable Tolling Of The 90-Day Filing Period

1. The jurisdiction of the federal courts of appeals is defined by statute. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Congress has unambiguously provided that the courts of appeals have jurisdiction over petitions for review of orders of removal. 8 U.S.C. § 1252(a)(1) ("Judicial review of a final order of removal ... is governed only by chapter 158 of title 28[.]"); 28 U.S.C. § 2342 (part of "chapter 158 of ti-

tle 28," granting "[t]he court of appeals ... exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" final agency actions); *see also* 8 U.S.C. § 1252(b) ("Requirements for review of orders of removal").

Congress also specifically granted jurisdiction to the courts of appeals to review BIA decisions on motions to reopen and to reconsider final orders of removal. 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of an order under this section, *any review sought of a motion to reopen or reconsider* the order shall be consolidated with the review of the order." (emphasis added)). Section 1252(b)(6) does not distinguish between particular grounds for denying a motion to reopen, demonstrating that Congress conferred jurisdiction on the courts of appeals to review decisions on motions to reopen generally, irrespective of the basis for the decision.

Furthermore, this Court held in 2010 that "[a]ction on motions to reopen ... remain[s] subject to judicial review," notwithstanding IIRIRA's significant modification of the INA's jurisdictional provisions. *Kucana* v. *Holder*, 558 U.S. 233, 253 (2010). *Kucana* rested in part on the "strong presumption" that Congress intends judicial review of administrative action and legislates with that presumption in mind. *Id.* at 251 (noting that the Court has "consistently applied" the presumption of judicial review to immigration decisions, "particularly to questions concerning the preservation of federal-court jurisdiction"); *see also INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001); *Reno* v. *Catholic Social Servs., Inc.*, 509 U.S. 43, 63-64 (1993) ("[T]here is a 'well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action.'"); *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It

is presumable that Congress legislates with knowledge of our basic rules of statutory construction, and ... our well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action[.]"); *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986) ("From the beginning, 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'" (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140 (1967))).

To overcome the presumption of judicial review of agency action, there must be "clear and convincing" evidence that Congress intended to foreclose review. *Traynor* v. *Turnage*, 485 U.S. 535, 542 (1988) (internal quotation marks omitted). But this Court has already held that there is "no ... evidence" that Congress intended to prevent judicial review of motions to reopen. *Kucana*, 558 U.S. at 252.[6]

Because Congress has given the courts of appeals jurisdiction to review BIA decisions denying motions to reopen, the court was required to exercise that jurisdiction and decide Mr. Mata's appeal on the merits. *See, e.g., Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) (noting the "virtually unflagging obligation of the federal courts to ex-

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[6] The statutory text favors jurisdiction in an additional way. Congress included a section listing "Matters not subject to judicial review," but did not list denials of motions to reopen in that section. 8 U.S.C. § 1252(a)(2). Since "Congress explicitly enumerate[d] certain exceptions to a general prohibition, additional exceptions are not to be implied." *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980); *see also Jama* v *ICE*, 543 U.S. 335, 341 (2005); *Raleigh & Gaston R.R. Co.* v. *Reid*, 80 U.S. (13 Wall.) 269, 270 (1872).

ercise the jurisdiction given them"); *Willcox* v. *Consolidated Gas Co.*, 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction[.]").

2. Against this backdrop, the commonplace and correct application of equitable tolling to the 90-day statutory filing period does nothing to disturb the courts of appeals' appellate jurisdiction. As the courts of appeals themselves have consistently held, and as the BIA noted in this case, the 90-day filing period in 8 U.S.C. § 1229a(c)(7)(C) is nonjurisdictional and subject to equitable tolling. *See* U.S. Cert. Br. 13 ("As the Board correctly noted in this case, 'the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel.'" (quoting Pet. App. 7 (BIA decision))).

Equitable tolling is "a long-established feature of American jurisprudence" that "pauses the running of, or 'tolls,' a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1231-1232 (2014). The doctrine "enables courts 'to meet new situations [that] demand equitable intervention, and to accord all the relief necessary to correct ... particular injustices.'" *Holland* v. *Florida*, 560 U.S. 631, 650 (2010). The effect of equitable tolling is to "extend[] the deadline for a filing because of an event or circumstance that deprives the filer, through no fault of his own, of the full period accorded by the statute." *McQuiggin* v. *Perkins*, 133 S. Ct. 1924, 1941 (2013) (Scalia, J., dissenting). The doctrine thus effectively extends the relevant period to treat an otherwise untimely action as timely. *See Lozano*, 134 S. Ct. at 1231-1232; *American Pipe & Constr. Co.* v. *Utah*, 414 U.S.

538, 560-561 (1974) (determining "the precise effect" that tolling "had on the relevant limitation period" and explaining that since suit was brought "with 11 days yet to run in the period as tolled by [the statute at issue]" and the "motions were filed only eight days after" the clock restarted, "it follows that the motions were timely").

The BIA was thus correct to recognize that Section 1229a(c)(7)(C)(i)'s 90-day filing period can be tolled in cases of ineffectiveness of counsel. Pet. App. 7. The time period is not jurisdictional, as it does not "govern[] a court's adjudicatory capacity, that is, its subject-matter or personal jurisdiction." *Henderson ex rel. Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011). Instead, the 90-day period is "[a]mong the types of rules that should not be described as jurisdictional," but rather as "'claim-processing rules,'" which merely "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Id.* at 1203; *see also Arbaugh* v. *Y & H Corp*, 546 U.S. 500, 510 (2006) ("[W]e have clarified that time prescriptions, however emphatic, are not properly typed jurisdictional." (internal quotation marks omitted)). Indeed, the text of Section 1229a(c)(7)(C)(i) is essentially indistinguishable from the statutory provision found to be a nonjurisdictional claim-processing rule in *Henderson*. *Compare* 38 U.S.C. § 7266(a) ("shall file a notice of appeal with the Court [of Appeals for Veterans Affairs] within 120 days after the date on which notice of the decision is mailed"), *with* 8 U.S.C. § 1229a(c)(7)(C)(i) ("the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal").

Such nonjurisdictional rules are "subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'"

Holland, 560 U.S. at 645-646. Indeed, Section 1229a(c)(7)(C)(i)'s simple, declarative structure mirrors other provisions that this Court has found subject to equitable tolling. *See id.* at 647 (applying equitable tolling where relevant statute "read[] like an ordinary, run-of-the-mill statute of limitations"); *cf. United States* v. *Brockamp*, 519 U.S. 347, 350 (1997) (explaining that "ordinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception" and noting as an example a provision requiring that employment discrimination suits be filed "'[w]ithin 90 days of receipt of notice of final [EEOC] action'").

Notably, Section 1229a(c)(7)(C)(i) was enacted in 1996,[7] after this Court's decision in *Irwin* v. *Department of Veterans' Affairs*, 498 U.S. 89 (1990), such that Congress "was likely aware that courts, when interpreting [the] timing provision[], would apply the presumption" of equitable tolling. *Holland*, 560 U.S. at 646; *see also Merck & Co.* v. *Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."); *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34, (1995) ("'[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [this Court's] precedents ... and that it expect[s] its enactment[s] to be interpreted in conformity with them.'" (quoting *Cannon* v. *University of Chi.*, 441 U.S. 677, 699 (1979))). And equitable tolling is particularly warranted in the context of removal proceedings under the INA, which are often navigated by "'laymen, unassisted

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[7] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-546, 3009-593.

by trained lawyers.'" *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982); *see* DOJ Executive Office for Immigration Review, *Statistical Yearbook 2000*, at J1 (2001) (in 1996, as Congress was considering Section 1229a(c)(7)(C)(i), a mere 37% of noncitizens whose removal proceedings were adjudicated by an immigration judge had legal representation).[8]

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[8] *Sebelius* v. *Auburn Regional Medical Center*, 133 S. Ct. 817 (2013), is not to the contrary. The Medicare time limitation at issue there, 42 U.S.C. § 1395oo(a)(3), was enacted in 1972, long before this Court's 1990 decision in *Irwin*, thus weakening the presumption in favor of equitable tolling in that case. *See Auburn Reg'l*, 133 S. Ct. at 827 (noting that the Act before 1972 did not provide for administrative or judicial review, and that the 180-deadline was enacted "with no statutory exceptions"); *see also Holland*, 560 U.S. at 646 (noting that "[t]he presumption's strength is yet further reinforced" where the relevant statute is enacted after *Irwin*). Additionally, in *Auburn Reg'l*, the agency had promulgated a regulation allowing for the statutory 180-day filing period to be extended up to three years "for good cause shown." 133 S. Ct. at 826. By allowing "only a distinctly limited extension of time to appeal," the agency had brought its specialized "experience" to bear on the issue and ultimately determined that the deadline should have "three years as the outer limit." *Id.* at 826. The Court was careful to note that the agency's decision to create an outer bound for the filing deadline was owed deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), and that the Court was ultimately compelled to uphold the agency's decision as a "permissible construction" of the statute, "even if it differ[ed] from how the court would have interpreted the statute in the absence of an agency regulation." *Auburn Reg'l*, 133 S. Ct. at 826-827 (citing *National Cable & Telecommc'ns Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)). Here, by contrast, no equivalent regulation exists, and the BIA itself has recognized the availability of equitable tolling of the 90-day filing period. Pet. App. 7. Finally, the appeals deadline in *Auburn Reg'l* applied only to Medicare providers, "'sophisticated' institutional providers assisted by legal counsel, and 'generally capable of identifying an underpayment ... within the 180-day time period specified in [the

3. The foregoing principles dictate the outcome in this case. Indeed, every circuit to have squarely addressed the issues has recognized both the availability of equitable tolling of the 90-day filing period for motions to reopen *and* exercised jurisdiction to review the BIA's equitable tolling determinations. Sometimes that jurisdiction is exercised to affirm the BIA's denial of equitable tolling on the merits. *E.g.*, *Iavorski* v. *INS*, 232 F.3d 124, 132-135 (2d Cir. 2000) (Sotomayor, J.); *see also Avila-Santoyo* v. *U.S. Att'y Gen.*, 579 F. App'x 860, 861-863 (11th Cir. 2014) (per curiam) (recognizing earlier holding in the same case that the 90-day period is subject to equitable tolling, 713 F.3d 1357 (11th Cir. 2013), and affirming BIA's equitable tolling decision on the merits); *Kuusk* v. *Holder*, 732 F.3d 302, 305-307 (4th Cir. 2013) (holding that motions to reopen are subject to equitable tolling and affirming the BIA's tolling determination on the merits); *Alzaarir* v. *Attorney Gen.*, 639 F.3d 86, 90-91 (3d Cir. 2011) (per curiam); *Galvez Piñeda* v. *Gonzales*, 427 F.3d 833, 838-839 (10th Cir. 2005). In appropriate cases, courts grant the petition for review and reverse the BIA's denial of equitable tolling. *E.g.*, *Avagyan* v. *Holder*, 646 F.3d 672, 678-682 (9th Cir. 2011); *Mezo* v. *Holder*, 615 F.3d 616, 620-622 (6th Cir. 2010); *Gaberov* v. *Mukasey*, 516 F.3d 590, 594-597 (7th Cir. 2008). Even the Fifth Circuit issued such a decision not long ago. *See Torabi* v. *Gonzales*, 165 F. App'x 326, 329, 330 (5th Cir. 2006) ("[W]e have jurisdiction to review the denial of Torabi's motion to reopen" and "hold the BIA abused its discretion by its untimeliness basis for denial."). Importantly, no circuit holds that the 90-day period is not subject to equitable

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statute]." 133 S. Ct. at 828. As explained in text, removal proceedings, which many unsophisticated parties must navigate without legal representation, are decidedly different.

tolling, and no circuit besides the Fifth holds that it lacks jurisdiction to review the BIA's equitable tolling determinations.[9]

Accordingly, the plain language of the INA's judicial review provisions, this Court's decision in *Kucana*, the presumption of review of agency action, and the availability and judicial reviewability of equitable tolling all point toward federal appellate jurisdiction in Mr. Mata's case.

B. The Fifth Circuit's Contrary Reasoning Is Erroneous

The Fifth Circuit nonetheless ruled that, where the BIA's denial of a motion to reopen is based on a refusal to equitably toll the statutory 90-day filing period, it lacks appellate jurisdiction to review the BIA's decision. Pet. App. 2-3. The Fifth Circuit's reasons for creating its own jurisdictional exception do not withstand scrutiny.

1. The Fifth Circuit's primary basis for refusing to hear Mr. Mata's appeal is that "[i]n this circuit, an alien's request for equitable tolling on the basis of ineffective assistance of counsel is *construed as* an invitation for the BIA to exercise its discretion to reopen the removal proceeding *sua sponte*." Pet. App. 2 (emphasis added). The court based this view on *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008), which in

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[9] The First Circuit has ruled that it has jurisdiction to review BIA decisions denying equitable tolling of the statutory 90-day period, though it has so far not needed to decide whether equitable tolling in fact applies. *Neves* v. *Holder*, 613 F.3d 30, 33 (1st Cir. 2010) (per curiam) ("We hold that we have jurisdiction to review the BIA's decision to deny equitable tolling of the time and number limitations governing [petitioner's] second motion to reopen[.]").

turn relied on three non-precedential decisions for the proposition that "equitable tolling of a time- or number-barred motion to reopen on the basis of ineffective assistance of counsel is 'in essence an argument that the BIA should have exercised its discretion to reopen the proceeding sua sponte.'" *Id.* at 220 (citing *Ben Jie Lin* v. *Mukasey*, 286 F. App'x 148, 150 (5th Cir. 2008) (per curiam); *Yang* v. *Mukasey*, 278 F. App'x 442, 443 (5th Cir. 2008) (per curiam); *Riera-Elena* v. *Mukasey*, 277 F. App'x 400, 402 (5th Cir. 2008) (per curiam)).

The Fifth Circuit's cases hold that an equitable tolling request must be treated as a request for *sua sponte* reopening on the theory that "equitable tolling is not a basis for filing an untimely or numerically-barred motion under the statute." *Ben Jie Lin*, 286 F. App'x at 150. That statement is simply incorrect. While such a motion is "untimely" in that it does not facially comply with the statute's claim-processing deadline, the effect of equitable tolling is to pause the running of the clock during the period when it would be inequitable to penalize the noncitizen for failing to file a motion. *See Lozano*, 134 S. Ct. at 1232 ("[equitable tolling] effectively extends an otherwise discrete limitations period"); *see also McQuiggin*, 133 S. Ct. at 1941 (Scalia, J., dissenting) (equitable tolling "extend[s] the deadline for a filing because of an event or circumstance that deprives the filer, through no fault of his own, of the full period accorded by the statute"); *United States* v. *Ibarra*, 502 U.S. 1, 4 n.2 (1991) (noting that equitable tolling serves to suspend a time bar that "begins to run again upon a later event"). Assuming the noncitizen acts diligently, the equitable tolling doctrine treats as timely a motion that would otherwise be untimely. Thus, contrary to the Fifth Circuit's statement in *Ben Jie Lin*, equitable

tolling *is* a basis for filing an otherwise untimely motion under the statute.

Consistently with these principles, courts of appeals have indicated that equitable tolling bears on a noncitizen's *statutory* right to seek reopening under 8 U.S.C. § 1229a(c)(7)(C)(i) and does not implicate the BIA's *regulatory* power to reopen a proceeding *sua sponte*. *E.g.*, *Kuusk*, 732 F.3d at 304-305 & n.* (reviewing request for equitable tolling of the 90-day period even though petitioner did not appeal the BIA's refusal to reopen the case *sua sponte*); *Socop-Gonzalez* v. *INS*, 272 F.3d 1176, 1183 (9th Cir. 2001) (en banc) ("Because we hold that the BIA should have equitably tolled the ninety-day filing period, we do not reach the question whether the BIA should have exercised its *sua sponte* power to reopen.").[10]

Accordingly, the Fifth Circuit was wrong to consider Mr. Mata's motion as a request for reopening under the BIA's regulatory *sua sponte* authority. Rather, it was a request for the BIA to treat his motion as time-

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[10] The Fifth Circuit's reliance on its *Ramos-Bonilla* decision also failed to account for that decision's different context. The motion to reopen in *Ramos-Bonilla* was not a post-IIRIRA statutory motion under 8 U.S.C. §1229a(c)(7)(C), but instead a motion to reopen a 1987 deportation proceeding subject to the pre-IIRIRA regulation. *See* 543 F.3d at 218 (citing 8 C.F.R. § 1003.2(c)(2)); *see also* IIRIRA § 309, 110 Stat. at 3009-625 (IIRIRA does not apply to a noncitizen who was in deportation proceedings before September 30, 1996); *Ramos-Bonilla*, 543 F.3d at 219 (Ramos-Bonilla was attempting to reopen a deportation order dated May 6, 1987). Because IIRIRA "transform[ed] the motion to reopen from a regulatory procedure to a statutory form of relief,'" *Kucana*, 558 U.S. at 249, the Fifth Circuit should not have applied the holding of *Ramos-Bonilla* to this case without at least examining whether Congress's codification of that remedy includes equitable tolling of the 90-day period. As shown in Part A above, it does.

ly filed under the statute itself, through operation of the equitable tolling doctrine.

2. The Fifth Circuit has also suggested (Pet. App. 2-3), citing *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985), that there is no jurisdiction to review a denial of equitable tolling because there is no "'meaningful standard'" by which to judge the agency's decision. *Ramos-Bonilla*, 543 F.3d at 220. That is also incorrect. "[G]iven the long history of judicial application of equitable tolling, courts can easily find precedents that can guide their judgments." *Holland*, 560 U.S. at 651. Indeed, this Court has announced a standard for equitable tolling that courts can readily apply. *See Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005) (a litigant must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way"); *see also Holland*, 560 U.S. at 651 (noting that "professional misconduct" can "create an extraordinary circumstance that warrants equitable tolling").

Indeed, when a noncitizen seeks to show that the "extraordinary circumstance" that stood in the way of his filing a motion to reopen within the 90-day period was his counsel's ineffective assistance, the BIA itself has crafted "meaningful standard[s]" that it and reviewing courts have also frequently applied. *See Matter of Lozada*, 19 I. & N. Dec. 637, 639-640 (BIA 1988); *see supra* pp. 21 (citing cases). Even the Fifth Circuit has shown itself capable of applying both the equitable tolling standard and the *Lozada* ineffective-assistance-of-counsel standard. *E.g.*, *Ben Jie Lin*, 286 F. App'x at 150 ("Lin has not shown that he is entitled to equitable tolling because he has failed to establish ineffective assistance of counsel under *Matter of Lozada* ... and has not shown that he acted with due diligence in present-

ing his ineffective assistance of counsel claim." (citation omitted)); *see also Shan Fu Cui* v. *Holder*, 347 F. App'x 101 (5th Cir. 2009) (affirming the BIA's denial of a motion to reopen where petitioner failed to comply with the *Lozada* requirements); *Torabi*, 165 F. App'x at 331 (applying equitable tolling doctrine and remanding to the BIA to decide the motion to reopen on the merits).[11]

3. Moreover, even if the Fifth Circuit were correct that Mr. Mata's request for equitable tolling due to ineffective assistance of counsel should be treated as a request for *sua sponte* reopening (though it should not be), the BIA's decision would still be reviewable. As discussed, the standard for equitable tolling is settled and easily applied. And the BIA's *Lozada* decision, dating from 1988, creates a longstanding agency practice regarding ineffective assistance claims that can establish a basis of review. *Franklin* v. *Massachusetts*, 505 U.S. 788, 820 (1992) (Stevens, J., concurring in part and concurring in the judgment) ("the statutory framework and *the long-held administrative tradition* provide a judicially administrable standard of review" (emphasis added)); *cf. INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that

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[11] *Heckler* itself arose in a far different context, namely an unusual judicial challenge to an agency's enforcement discretion under its own regulations. 470 U.S. at 827. This case, by contrast, involves an appeal of an agency's decision on an individual's attempt to vindicate his statutory right to file a motion to reopen a proceeding.

must be overturned as 'arbitrary, capricious, [or] an abuse of discretion[.]'" (internal quotation marks omitted)); *see supra* pp. 21 (citing cases reviewing BIA decisions involving equitable tolling and ineffective assistance of counsel).

It accordingly does not matter whether a noncitizen's claim for equitable tolling due to ineffective assistance of counsel is considered a statutorily authorized motion to reopen or a request for *sua sponte* reopening—in either scenario, the BIA applies a "meaningful standard" (Pet. App. 2) that can be reviewed by the court of appeals. That is a far cry from *Heckler*, where the decision whether to begin enforcement proceedings was "'committed' ... to the agency's judgment absolutely" and was a matter "within its expertise" requiring consideration of "many variables involved in the proper ordering of its priorities." 470 U.S. at 830, 831-832. By contrast, equitable tolling is a doctrine familiar to federal courts and not particular to the agency's expertise. There is accordingly no reason why courts cannot review BIA decisions denying equitable tolling due to ineffective assistance of counsel, regardless of what reopening authority the BIA invokes.

* * *

The Fifth Circuit was not free to develop its own judicially created exception to the jurisdiction Congress has given it by statute. The case should be remanded for that court to decide Mr. Mata's appeal on the merits.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

MARK C. FLEMING
SYDENHAM B. ALEXANDER, III
NICOLE FONTAINE DOOLEY
JEFFERY A. HABENICHT
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

JASON D. HIRSCH
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

CLAIRE M. BERGERON
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

RAED GONZALEZ
Counsel of Record
NAIMEH SALEM
SHERIDAN GREEN
BRUCE GODZINA
GONZALEZ OLIVIERI LLC
2200 Southwest Fwy.
Suite 550
Houston, TX 77098
(713) 481-3040
rgonzalez@gonzalezolivierillc.com

BRIAN K. BATES
REINA & BATES
123 Northpoint Drive
Suite 190
Houston, TX 77060

ALEXANDRE I. AFANASSIEV
QUAN LAW GROUP
544 Westheimer Street
Suite 1750
Houston, TX 77056

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APPENDIX

STATUTORY AND REGULATORY PROVISIONS

8 U.S.C. § 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

* * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

* * *

8 U.S.C. § 1229a. Removal proceedings

* * *

(c) Decision and burden of proof

* * *

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

* * *

8 U.S.C. § 1229b. Cancellation of removal; adjustment of status

* * *

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

* * *

8 U.S.C. § 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review

any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court

of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

* * *

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

* * *

8 C.F.R. § 1003.2. Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.

* * *

(c) *Motion to reopen.*

(1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former

hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 1003.23(b)(4)(ii). The time and numerical limitations set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 1003.23(b)(4)(iii)(A)(1) or § 1003.23(b)(4)(iii)(A)(2);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(f) of this chapter.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

* * *

No. 14-185

In the Supreme Court of the United States

NOEL REYES MATA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT SUPPORTING REVERSAL AND REMAND

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOYCE R. BRANDA
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
DONALD E. KEENER
PATRICK J. GLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals has jurisdiction to review the Board of Immigration Appeals' decision denying petitioner's request for equitable tolling of the 90-day deadline for filing petitioner's motion to reopen removal proceedings on account of alleged ineffective assistance of counsel.

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In the Supreme Court of the United States

No. 14-185

NOEL REYES MATA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT SUPPORTING REVERSAL AND REMAND

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is reprinted in 558 Fed. Appx. 366. The decisions of the Board of Immigration Appeals (Pet. App. 4-5, 6-9; J.A. 4-5) and Immigration Judge (J.A. 6-13) are unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 5, 2014. A petition for rehearing was denied on May 16, 2014 (Pet. App. 24-25). The petition for a writ of certiorari was filed on August 14, 2014, and

[1] The initial, unsigned transcription of the Immigration Judge's oral decision (Pet. App. 10-23) does not contain the Judge's corrections to that transcription in her signed decision (J.A. 6-13).

was granted on January 16, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-19a.

STATEMENT

Petitioner is a native and citizen of Mexico who unlawfully entered the United Sates without being admitted or paroled. Pet. App. 1; Administrative Record (A.R.) 562. The Immigration Judge (IJ) ordered petitioner removed from the United States, J.A. 6-13, and the Board of Immigration Appeals (Board) summarily dismissed his appeal because petitioner failed to file an appellate brief or any other explanation of the basis for his appeal, J.A. 4-5.

After the deadline for filing a motion to reopen the removal proceedings had passed, petitioner filed such a motion with the Board. Pet. App. 6. "A motion to reopen is a form of procedural relief that 'asks the Board to change its decision in light of newly discovered evidence or a change in circumstances.'" *Dada* v. *Mukasey*, 554 U.S. 1, 12 (2008). Petitioner argued in his motion (A.R. 88-96) that his prior counsel was ineffective and that counsel's ineffective assistance was an exceptional circumstance warranting reopening. A.R. 95. The Board held that "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel," but it denied the motion because petitioner failed to show his eligibility for relief from removal. Pet. App. 7-9.

The court of appeals held that it lacked jurisdiction to review the Board's decision denying petitioner's

motion to reopen. Pet. App. 1-3. The court stated that it would "construe[]" petitioner's "request for equitable tolling on the basis of ineffective assistance of counsel" as a request that the Board exercise its discretion to reopen proceedings "*sua sponte*," and that it lacked jurisdiction to review the latter, "complete[ly] discretion[ary]" Board decision. *Id.* at 2-3. The government agrees with petitioner that the court of appeals erred, because the court did have jurisdiction to review the Board's denial of petitioner's untimely motion to reopen.

1. a. i. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, "guarantees to each alien the right to file 'one motion to reopen [removal] proceedings'" under 8 U.S.C. 1229a. *Dada*, 554 U.S. at 15 (quoting 8 U.S.C. 1229a(c)(7)(A)). That motion must be filed with the Board or IJ, whichever was last to render a decision in the case. 8 C.F.R. 1003.2(a) and (c) (Board); 8 C.F.R. 1003.23(b)(1) and (3) (IJ). The motion must be "supported by affidavits or other evidentiary materials" showing "new facts," 8 U.S.C. 1229a(c)(7)(B), that are "'material' and of the sort that 'could not have been discovered or presented at the former hearing.'" *Dada*, 554 U.S. at 14 (quoting 8 C.F.R. 1003.2(c)(1)); see 8 C.F.R. 1003.23(b)(3) (IJ).

The INA provides that an alien's "motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal," subject to certain exceptions. 8 U.S.C. 1229a(c)(7)(C)(i); see 8 C.F.R. 1003.2(c)(2), 1003.23(b)(1). Specifically, that deadline is lengthened or eliminated for several types of reopening motions not relevant here, *i.e.*, certain motions seeking asylum or withholding of removal based on "changed country conditions"; requesting

rescission of a removal order entered in absentia under 8 U.S.C. 1229a(b)(5); and seeking relief under special provisions for certain battered spouses, children, and parents. 8 U.S.C. 1229a(c)(7)(C)(ii)-(iv); see 8 C.F.R. 1003.2(c)(3), (ii) and (iii), 1003.23(b)(4)(i) and (ii). In addition, if the alien and the Department of Homeland Security (DHS) agree on reopening and "jointly file[]" a motion to reopen, the joint motion may be filed at any time. 8 C.F.R. 1003.2(c)(3)(iii), 1003.23(b)(4)(iv).[2]

"The decision to grant or deny a motion to reopen" lies "within the discretion of the Board." 8 C.F.R. 1003.2(a); see 8 C.F.R. 1003.23(b)(1)(iv) (IJ). The Board may deny a motion to reopen on any of "at least three independent grounds." *INS* v. *Abudu*, 485 U.S. 94, 104 (1988). First, the Board may conclude that the alien failed to establish a "prima facie case" of eligibility for the underlying relief sought by failing to show a "reasonable likelihood of success on the merits" if proceedings were reopened. *In re L-O-G-*, 21 I. & N. Dec. 413, 419-420 (B.I.A. 1996); see *Abudu*, 485 U.S. at 104. Second, "[t]he Board has discretion to deny a motion to reopen even if the [movant] has made out a

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[2] The timing requirements for motions to reopen removal proceedings are different from those for motions to reopen deportation or exclusion proceedings commenced prior to 1996. In 1996, Congress abolished the distinction between deportation and exclusion procedures by establishing "removal" proceedings as the uniform agency process to adjudicate cases of deportable and inadmissible aliens. 8 U.S.C. 1229a(a)(1), (3) and (e)(2); see *Vartelas* v. *Holder*, 132 S. Ct. 1479, 1484-1485 (2012). The timing of motions to reopen legacy cases in deportation or exclusion proceedings remain governed by distinct provisions not relevant here. See 8 U.S.C. 1252b(c)(3) (1994) (repealed 1996); 8 C.F.R. 1003.2(c)(2), (3)(i) and (iv), 1003.23(b)(1) and (4)(iii).

prima facie case." 8 C.F.R. 1003.2(a); see 8 C.F.R. 1003.23(b)(3) (IJ). The Board may thus deny reopening if it finds that the alien failed to proffer "previously unavailable, material evidence" or otherwise to explain adequately his failure to seek relief earlier. *Abudu*, 485 U.S. at 104-105; see 8 C.F.R. 1003.2(c)(1) (motion "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing"); 8 C.F.R. 1003.23(b)(3) (IJ). Third, where the ultimate grant of relief is discretionary (*e.g.*, cancellation of removal), the Board may conclude that, regardless of the proper resolution of the "two threshold concerns" just discussed, the alien should not be afforded the "discretionary grant" of relief. *Abudu*, 485 U.S. at 105.

Motions to reopen removal proceedings are "disfavored" because "[t]here is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their * * * cases," *Abudu*, 485 U.S. at 107, and because, as a general matter, "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States," *INS* v. *Doherty*, 502 U.S. 314, 323 (1992). Accordingly, an alien moving the Board for reopening must "meet[] a 'heavy burden' and present[] evidence of such a nature that the Board is satisfied that if proceedings * * * were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *In re Coelho*, 20 I. & N. Dec. 464, 473 (B.I.A. 1992); see *Abudu*, 485 U.S. at 110.

ii. The authority of the Board to reopen removal proceedings is not limited to its adjudication of a motion filed by an alien. The Board "may at any time reopen" the proceedings "on its own motion" in any case in which it has rendered a decision. 8 C.F.R. 1003.2(a); see 8 C.F.R. 1003.23(b)(1) (IJ). Accordingly, if an alien fails to file a timely motion to reopen, he may suggest that the Board exercise that authority to reopen his case *sua sponte*. The Board "invoke[s] [its] sua sponte authority sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *In re G-D-*, 22 I. & N. Dec. 1132, 1133-1134 (B.I.A. 1999).

b. The INA provides that, with exceptions not relevant here, "[j]udicial review of a final order of removal * * * is governed only by [the Administrative Orders Review Act of 1950 (Hobbs Act), 28 U.S.C. 2341 *et seq.*]," and that such Hobbs Act review in a court of appeals is "the sole and exclusive means for judicial review of an order of removal." See 8 U.S.C. 1252(a)(1), (5) and (b)(9); *Stone* v. *INS*, 514 U.S. 386, 392 (1995). That jurisdiction extends to judicial review of an order denying an alien's motion to reopen. *Id.* at 394. If the alien also petitions for review of the underlying order of removal, the INA requires that "any review sought of a motion to reopen * * * shall be consolidated with the review of the order." 8 U.S.C. 1252(b)(6).

2. a. Petitioner unlawfully entered the United States on an unknown date. A.R. 562. In August 2010, he was charged with assault on a family member under Texas Penal Code Ann. § 22.01(a)(1) (West

2011), for striking and grabbing a woman with whom he was then having a "dating relationship." Pet. App. 12; A.R. 523 (criminal information), 526-527 (judgment of conviction).[3] In September 2010, petitioner pleaded guilty to the assault charge. A.R. 526-527. The trial court expressly found, under Article 42.013 of the Texas Code of Criminal Procedure, that petitioner's offense involved "family violence." A.R. 526; see Pet. App. 12-13.

b. The day after his conviction, DHS initiated removal proceedings against petitioner. Pet. App. 11; A.R. 562-563. Petitioner conceded that he was removable as charged, J.A. 196 (hearing transcript), but filed an application for cancellation of removal (A.R. 212-519). Pet. App. 11; A.R. 196-197.

Cancellation of removal is a form of discretionary relief available for certain aliens. 8 U.S.C. 1229b. In general, a non-permanent-resident alien like petitioner must establish four statutory prerequisites to be eligible for such relief. 8 U.S.C. 1229b(b)(1)(A)-(D). Two of those prerequisites are that (a) the alien has not been convicted of an offense described in 8 U.S.C. 1182(a)(2), 1227(a)(2) or (3); and (b) "removal would result in exceptional and extremely unusual hardship to [his] spouse, parent, or child" who is a United States citizen or lawful permanent resident. 8 U.S.C. 1229b(b)(1)(C)-(D).

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[3] The district attorney's records state that petitioner was married to the victim, who informed the police that petitioner had "struck her on multiple occasions," and that petitioner had been charged because he had "kicked [her]," "threw her to the ground," and then "grabbed [her] by the hair and began to drag her through the house." A.R. 541; see A.R. 523 (charging petitioner for kicking and grabbing the victim); cf. J.A. 18.

In August 2011, the IJ denied petitioner's application and ordered him removed to Mexico. Pet. App. 21-23 (order); J.A. 6-13 (opinion). The IJ concluded that petitioner's assault offense, which was "morally reprehensible and necessarily involve[d] turpitudinous conduct," was a "crime involving moral turpitude" under 8 U.S.C. 1227(a)(2)(A)(i) that rendered petitioner ineligible for cancellation of removal. J.A. 11-12.

c. In September 2011, petitioner, through counsel, timely noticed an administrative appeal. A.R. 173-175. The form notice included a prominent warning instructing petitioner to "clearly explain the specific facts and law on which you base your appeal," because "[t]he Board may summarily dismiss your appeal" if it cannot determine its basis. A.R. 174. Counsel did not identify the appeal's factual or legal basis, but he checked a box indicating that a separate, written brief would be filed. *Ibid.* The October 2011 briefing notice informed petitioner that his brief would be due on November 10, 2011, and warned that "[i]f you fail to file the brief" by that date, "the Board may summarily dismiss your appeal." A.R. 168. On October 26, 2011, petitioner's counsel mailed a motion to extend petitioner's briefing deadline by 21 days. A.R. 165-166. On November 1, 2011, the motion was denied. A.R. 160. The denial stated that, if petitioner were to file a brief after the November 10 deadline, the brief must be accompanied with "a motion for consideration of [the] late-filed brief * * * set[ting] forth in detail the reasons that prevented you from filing your brief on time." *Ibid.* Petitioner failed to file a brief. J.A. 5.

On September 21, 2012, more than ten months after petitioner's briefing deadline had passed, the Board summarily dismissed petitioner's appeal. J.A.

4-5; see 8 C.F.R. 1003.1(d)(2)(i)(A) and (E). The Board explained that petitioner's notice of appeal did not identify the basis for his appeal and that petitioner failed to file a brief despite being warned that such a failure could result in summary dismissal. J.A. 4-5. The Board's decision was promptly served on petitioner by mail. A.R. 118 ¶ 21, 138-139. Petitioner did not seek judicial review.

3. a. By October 15, 2012, petitioner had already consulted with new attorneys about his case, at least two of whom told him that his prior counsel had performed ineffectively by failing to file an appellate brief. A.R. 118 ¶ 25, 119. At that point, petitioner still had more than two months before the 90-day period to file a motion to reopen would expire (on December 20, 2012). See 8 U.S.C. 1229a(c)(7)(C)(i); 8 C.F.R. 1003.2(c)(2). Petitioner failed to file a motion to reopen by that deadline.

On January 14, 2013, petitioner filed a motion with the Board to reopen his case. Pet. App. 6; see A.R. 88-95 (motion); A.R. 96-135 (motion's exhibits). Petitioner argued that he met the requirements in *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988), for establishing a claim of ineffective assistance of counsel as a basis for reopening. A.R. 92-95. *Lozada* established three procedural requirements for motions to reopen based on ineffective assistance of counsel. Such a motion must include an affidavit from the alien detailing the relevant facts; show that the alien informed his prior counsel of the allegations and attach any response to the motion; and show that a complaint has been submitted to "appropriate disciplinary authorities" for any violation of counsel's "ethical or legal responsibilities" or explain why one was not submit-

ted. *Lozada*, 19 I. & N. Dec. at 639. In addition, the motion must demonstrate that the alien was "prejudice[d]" by counsel's allegedly deficient actions or inactions. *Id.* at 638, 640; see *In re Assaad*, 23 I. & N. Dec. 553, 556 (B.I.A. 2003). Petitioner's motion, however, did not show why his counsel's actions prejudiced him in his ability to seek cancellation of removal, because the motion neither addressed why petitioner's conviction was not a crime involving moral turpitude nor proffered a proposed brief explaining how the IJ had erred. Pet. App. 8.

b. The Board denied reopening. Pet. App. 6-9. The Board noted that, although petitioner's motion was not filed timely, "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel." *Id.* at 6-7. The Board rejected petitioner's tolling request, however, because petitioner failed to establish that he was prejudiced by the asserted ineffectiveness. *Id.* at 7-9.

That was so, the Board explained, because petitioner failed to show, for two independent reasons, that he "is eligible for the [cancellation-of-removal] relief [he] sought." Pet. App. 7. First, the Board reasoned that petitioner's assault offense was a crime involving moral turpitude rendering him ineligible for cancellation relief. *Id.* at 7-8. Petitioner's motion to reopen, the Board observed, failed to include "a proposed appellate brief or other argument to persuade" the Board that the IJ's ruling on that issue was "incorrect or would have been overturned on appeal if a brief had been filed" by counsel. *Id.* at 8. Second, the Board concluded that the hardships to petitioner's children identified in his motion did not warrant reopening because they were not the type of "'exceptional

and extremely unusual' hardships" required for petitioner to be eligible for cancellation of removal. *Id.* at 8-9 (quoting 8 U.S.C. 1229b(b)(1)(D)).

The Board separately declined to exercise its authority to reopen the removal proceedings on its "own motion." Pet. App. 9 (quoting *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997)). The Board noted that its authority to reopen proceedings *sua sponte* "'is not meant to be used as a general cure for filing defects.'" *Ibid.* (quoting *In re J-J-*, 21 I. & N. Dec. at 984).[4]

4. The court of appeals, as relevant here, dismissed petitioner's petition for review of the Board's decision denying his motion to reopen. Pet. App. 1-3. Petitioner acknowledged to the court that his motion to reopen was filed after the 90-day deadline had passed, but he contended that the Board should have equitably tolled the filing deadline because counsel's failure to file a brief in petitioner's original appeal to the Board constituted ineffective assistance. *Id.* at 2. In response, the government argued, *inter alia*, that the court of appeals lacked jurisdiction to consider the Board's denial of petitioner's request for equitable tolling under the court's prior decision in *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008)). Gov't C.A. Br. 18-19.

The court of appeals concluded that it lacked jurisdiction to review the Board's reopening decision. Pet. App. 2-3. The court explained that, under circuit

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[4] The Board denied petitioner's subsequent motion to reconsider its reopening denial. Pet. App. 4-5. Petitioner filed a separate petition for review to challenge that decision, but the court of appeals denied that petition because petitioner "abandoned [his] challenge" by failing to brief it adequately. *Id.* at 3. That aspect of the court of appeals' decision is not before this Court.

precedent, "an alien's request for equitable tolling on the basis of ineffective assistance of counsel is construed as an invitation for the [Board] to exercise its discretion to reopen the removal proceeding *sua sponte*." *Id.* at 2 (citing *Ramos-Bonilla*, 543 F.3d at 220). The court reasoned that because the Board has "complete discretion" in determining whether to reopen *sua sponte*, the court has "no meaningful standard against which to judge [the Board's] exercise of [that] discretion." *Id.* at 2-3. The court therefore held that it "lack[ed] jurisdiction to review such decisions." *Id.* at 3.

SUMMARY OF ARGUMENT

The question presented in this case is narrow: Whether the court of appeals had jurisdiction to conduct judicial review of the Board's denial of petitioner's request to equitably toll the 90-day filing deadline for his motion to reopen based on his assertion of ineffective assistance of counsel. That jurisdictional issue does not turn on the proper resolution of the merits of the yet-to-be-performed review. It therefore does not require this Court to decide whether the Board in fact erred in its disposition or whether equitable tolling is appropriate in motion-to-reopen contexts more generally. The question presented merely asks whether the court of appeals had authority to decide such issues. The government agrees with petitioner that the court of appeals possessed jurisdiction to review the Board's reopening decision. This case should be remanded to the court of appeals to conduct such review in the first instance.

1. This Court has repeatedly concluded that the courts of appeals have jurisdiction to review the Board's denial of a motion to reopen, albeit under a

highly deferential abuse-of-discretion standard. That jurisdiction to review the Board's denial of a motion to reopen flows directly from the INA's express grant of Hobbs Act jurisdiction to the courts of appeals to review final orders of removal. 8 U.S.C. 1252(a)(1); 28 U.S.C. 2342. Indeed, Congress has expressly directed that judicial review of "a motion to reopen" be consolidated with review of the underlying order of removal. 8 U.S.C. 1252(b)(6).

Judicial review of the Board's denial of a motion to reopen as untimely based on the Board's conclusion that equitable tolling of the alien's deadline is unwarranted is not materially different from judicial review of the Board's denial of motions to reopen more generally. Each component of the Board's tolling decisions—whether the alien was diligent in pursing his rights, whether the alien satisfied the *Lozada* requirements for establishing ineffective assistance, and whether the alien showed that he was prejudiced thereby with a sufficient showing that he is eligible for the underlying form of relief that he would seek in reopened removal proceedings—is properly and regularly reviewed by the courts of appeals for an abuse of discretion.

2. The court of appeals concluded that, under its precedent, it was bound to "construe[]" petitioner's motion to reopen seeking "equitable tolling on the basis of ineffective assistance of counsel" as "an invitation for the [Board] to exercise its discretion to reopen the removal proceedings *sua sponte*." Pet. App. 2. That approach was erroneous for multiple reasons. First, the Board did not base its decision on that ground, and it is well settled that judicial review of agency action is confined to "the grounds upon

which the [*agency*] *itself* based its action." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (emphasis added). Second, the Board's authority to equitably toll the 90-day filing deadline for an *alien's motion* to reopen is logically and doctrinally distinct from the Board's independent authority to reopen removal proceedings "at any time" "on its *own motion*," 8 C.F.R. 1003.2(a) (emphasis added). The very concept of tolling a deadline makes no sense when the Board exercises its *sua sponte* reopening authority because no deadline governs that independent power. Indeed, as in this case, the Board analyzes equitable tolling for ineffective-assistance separately from its *sua sponte* authority.

Whether the Board's conclusion that equitable tolling is available in appropriate circumstances in this context, and whether the Board abused its discretion in denying reopening in this case, are merits questions that are not before this Court and should not be addressed at this time. The question presented is limited to whether the court of appeals had jurisdiction to conduct judicial review, and the court of appeals has yet to resolve on the merits whether the Board erred in its tolling analysis in this case. Moreover, the court of appeals has not resolved in a precedential decision whether the 90-day deadline for an alien's motion to reopen may be equitably tolled. Although the government's position is that the Board correctly exercised its discretion in concluding that the deadline may be equitably tolled in appropriate cases, the court of appeals can resolve that merits question in the first instance on remand.

ARGUMENT

THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE BOARD'S DENIAL OF PETITIONER'S REQUEST TO EQUITABLY TOLL THE 90-DAY FILING DEADLINE FOR HIS MOTION TO REOPEN BASED ON ASSERTED INEFFECTIVE ASSISTANCE OF COUNSEL

The court of appeals erred in holding that it lacked jurisdiction to review the Board's denial of petitioner's motion to reopen proceedings before the Board. The Board held that "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel," but it concluded that tolling was unwarranted in this case because petitioner failed to establish a necessary element of his ineffectiveness claim: prejudice. Pet. App. 6-7. The Board explained that petitioner had not shown that deficient conduct by his counsel prejudiced him because his reopening motion failed to demonstrate a *prima facie* case that petitioner was eligible for cancellation of removal. *Id.* at 7-9. That was so, the Board reasoned, both because petitioner's conviction disqualified him for that relief and because petitioner's motion had not demonstrated that his removal would result in "exceptional and extremely unusual" hardship to his children. *Ibid.* (quoting 8 U.S.C. 1229b(b)(1)(D)). The Board's denial of a request for equitable tolling, and the resulting denial of an alien's motion to reopen as untimely, are subject to review in the same manner as other decisions denying motions to reopen. Accordingly, the court of appeals here had jurisdiction to review the Board's ruling denying equitable tolling in the same way that courts of appeals have long conducted judicial review of the Board's denial of motions to reopen proceedings.

A. The Court Of Appeals Had Jurisdiction To Review The Board's Denial Of Petitioner's Motion To Reopen

The INA vests the courts of appeals with jurisdiction to review the Board's denial of a motion to reopen as an aspect of the courts' jurisdiction to review final orders of removal under 8 U.S.C. 1252. Federal courts for a century have exercised jurisdiction to review such denials, and, since 1961, the courts of appeals have had jurisdiction to review the Board's denial of a motion to reopen under a deferential abuse-of-discretion standard. Nothing about this case warrants a different result.

1. The INA vests courts of appeals with Hobbs Act jurisdiction to review final orders of removal

The INA provides that, with certain exceptions not relevant here, "[j]udicial review of a final order of removal" is "governed only by chapter 158 of title 28" of the United States Code. 8 U.S.C. 1252(a)(1); see 8 U.S.C. 1252(a)(5) and (b)(9) (such review is "the sole and exclusive means for judicial review of an order of removal"). That reference to Chapter 158 of Title 28 is to the Administrative Orders Review Act of 1950, 28 U.S.C. 2341 *et seq.*, commonly known as the Hobbs Act. See *Stone* v. *INS*, 514 U.S. 386, 392-393 (1995) (discussing Section 1252's predecessor). The Hobbs Act, in turn, vests courts of appeals with jurisdiction to conduct direct review of final agency orders. 28 U.S.C. 2342.

Such review of final orders of removal is governed by the background principles in the judicial-review provisions of Section 10 of the Administrative Procedure Act (APA), which is now codified as 5 U.S.C. 701-706. In *Shaughnessy* v. *Pedreiro*, 349 U.S. 48, 50-52 (1955), this Court held that the "right of review grant-

ed by § 10 of the [APA]" governed judicial review of deportation orders under the INA. That APA review was initially conducted by district courts because at the time no "special statutory review proceeding relevant to the subject matter" governed the "form of proceeding for judicial review" of deportation orders. See 5 U.S.C. 703; *Pedreiro*, 349 U.S. at 49, 52; see also *Agosto* v. *INS*, 436 U.S. 748, 752-753 & n.3 (1978). In 1961, however, Congress enacted the predecessor to 8 U.S.C. 1252, which adopted the Hobbs Act's procedures "vest[ing] exclusive jurisdiction in the Federal courts of appeals" in order to establish a special statutory "judicial review proceeding precisely as is contemplated by the Administrative Procedure Act." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 2, 27 (1961); see *Agosto*, 436 U.S. at 752-753; 8 U.S.C. 1105a(a) (1994) (repealed 1996) (predecessor to 8 U.S.C. 1252(a)(1)). The Hobbs Act thus generally "specifies the form of proceeding for judicial review" of removal orders under the INA, while the APA "codifies the nature and attributes of judicial review." See *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987); S. Rep. No. 2618, 81st Cong., 2d Sess. 4 (1950) (explaining that "[t]he scope of review" under the Hobbs Act "is governed by [S]ection 10(e) of the [APA]," 5 U.S.C. 706).[5]

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[5] Unlike the APA's judicial-review provisions, the administrative "hearing provisions" of the APA (5 U.S.C. 554, 556, 557) do not govern removal proceedings before an IJ or the Board. *Marcello* v. *Bonds*, 349 U.S. 302, 306-307, 311 (1955); *id.* at 309 (holding that 8 U.S.C. 1229a(a)(3)'s predecessor is a "clear and categorical direction" that "exclude[s] the application of the [APA]" to administrative immigration proceedings); see *Ardestani* v. *INS*, 502 U.S. 129, 133-134 (1991).

Under the APA's judicial-review provisions, a court may set aside final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A); see *Judulang* v. *Holder*, 132 S. Ct. 476, 483 & n.7 (2011) (reviewing non-statutory policy adopted by the Board under the APA's arbitrary-and-capricious standard); *INS* v. *Doherty*, 502 U.S. 314, 330 & n.1 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (explaining that the APA's "abuse of discretion" standard applies in judicial review under the INA). The INA, however, "alter[s] or modif[ies] the[] application" of the APA's judicial-review provisions in various ways to tailor them to the immigration context. See *Stone*, 514 U.S. at 393. Among other things, Section 1252 codifies the substantial-evidence standard for judicial review of "administrative findings of fact," see 8 U.S.C. 1252(b)(4)(B); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1, 483-484 (1992), and establishes distinct standards for review of certain agency decisions not relevant here. 8 U.S.C. 1252(b)(4)(C) and (D).

2. The court of appeals' jurisdiction includes jurisdiction to review the denial of an alien's motion to reopen

The INA expressly contemplates judicial review of the Board's denial of a motion to reopen in the court of appeals' exercise of its jurisdiction under Section 1252 to review final orders of removal. 8 U.S.C. 1252(b)(6). Although Congress has sharply circumscribed review of certain discretionary decisions, courts continue to have jurisdiction to review the Board's denial of an alien's motion to reopen.

When an alien seeks judicial review of a final order of removal, the INA directs that "any review sought of a motion to reopen * * * shall be consolidated with the review of the [underlying] order." 8 U.S.C. 1252(b)(6); accord 8 U.S.C. 1105a(a)(6) (1994) (repealed 1996). Congress adopted that provision in 1990 against a long history of "[f]ederal court review of administrative decisions denying motions to reopen removal proceedings dat[ing] back to at least 1916," *Kucana* v. *Holder*, 558 U.S. 233, 242 (2010). Cf. *Stone*, 514 U.S. at 393-401 (holding that the time to seek judicial review of a final order of removal is not tolled by a subsequent motion to reopen). Congress's express provision for such review confirms the court of appeals' traditional role in reviewing motions to reopen.

In 1996, Congress added multiple provisions to the INA to limit the scope of judicial review by defining categories of agency determinations that federal courts lack "jurisdiction to review." See 8 U.S.C. 1252(a)(2); see also 8 U.S.C. 1252(a)(5). Among other things, the INA provides that courts lack "jurisdiction to review" any non-asylum decision or action "specified under [8 U.S.C. 1151-1381] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). Those provisions, however, did not eliminate the court of appeals' preexisting jurisdiction to review the Board's denial of a motion to reopen. Although the Board exercises discretionary authority delegated by the Attorney General to grant or deny an alien's motion to reopen, 8 C.F.R. 1003.1(a)(1), 1003.2(a); see 8 U.S.C. 1103(g)(1) and (2), this Court has held that Section 1252(a)(2)(B)(ii)'s jurisdiction-stripping provisions do not insulate reopening decisions from judicial

review because such decisions are not specified in the INA (as distinguished from implementing regulations) to be in the discretion of the Attorney General. *Kucana*, 558 U.S. at 243-252. As a result, the Court concluded, the Board's "[a]ction on motions to reopen" that are filed by aliens "remain[s] subject to judicial review." *Id.* at 253.[6]

3. The Board's denial of a motion to reopen is reviewed under a deferential abuse-of-discretion standard

a. The Board's broad discretion with respect to reopening determines the appropriate standard of review. The INA identifies no circumstances in which reopening must be granted, see 8 U.S.C. 1229a(c)(7), and the relevant regulation (8 C.F.R. 1003.2) "is couched solely in negative terms," requiring only that "a motion to reopen be denied" if the Board determines that the motion fails to provide "material" evidence that could not have been discovered or presented earlier, *Doherty*, 502 U.S. at 322-323. The regulation thus states, without elaboration or further limitation, that "[t]he decision to grant or deny a motion to reopen is within the discretion of the Board." 8 C.F.R. 1003.2(a). An alien therefore is entitled to submit a motion to reopen for consideration, see 8 U.S.C. 1229a(c)(7), but ultimately has no right to a reopening, which remains a matter left to administrative discretion.

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[6] The Court has not decided whether "review of a reopening denial" is precluded "if the [reviewing] court would lack jurisdiction over the alien's underlying claim for relief." *Kucana*, 558 U.S. at 250 n.17. That question is not presented in this case.

Notwithstanding that discretion, this Court has "reviewed reopening decisions on numerous occasions." *Kucana*, 558 U.S. at 242. The Court has concluded that a highly "deferential, abuse-of-discretion standard of review" applies to preserve "the Board's 'broad discretion' in such matters." *Ibid.* (quoting *Doherty*, 502 U.S. at 323). The Court has recognized that the Board may deny a motion to reopen on "at least three independent grounds." *INS* v. *Abudu*, 485 U.S. 94, 104 (1988). The abuse-of-discretion standard applies to each such ground.

First, the Board may deny reopening if it concludes that the alien failed to establish a "prima facie case" of eligibility for the substantive form of relief he seeks by failing to show a "reasonable likelihood of success on the merits" if proceedings were reopened. *In re L-O-G-*, 21 I. & N. Dec. 413, 419-420 (B.I.A. 1996); see *In re A-N- & R-M-N-*, 22 I. & N. Dec. 953, 956 (B.I.A. 1999); see also *Abudu*, 485 U.S. at 104 (noting this basis). The judgment whether an alien has shown a "reasonable likelihood" of success before the Board is a predictive judgment for the Board warranting abuse-of-discretion review. See, *e.g.*, *Antia-Perea* v. *Holder*, 768 F.3d 647, 660-661 (7th Cir. 2014) (applying abuse-of-discretion review to denial of a motion to reopen based on the Board's conclusion that the alien failed to establish a *prima facie* case of eligibility for relief); *Xiu Ling Chen* v. *Holder*, 751 F.3d 876, 879-880 (8th Cir. 2014) (same); *Jutus* v. *Holder*, 723 F.3d 105, 111-112 (1st Cir. 2013) (same); *Garcia* v. *Holder*, 621 F.3d 906, 912 (9th Cir. 2010) (same); *Alizoti* v.

Gonzales, 477 F.3d 448, 451-452 (6th Cir. 2007) (same).[7]

Second, the Board may deny reopening "even if the [alien] has made out a *prima facie* case," 8 C.F.R. 1003.2(a), if it concludes that the alien failed either to proffer "previously unavailable, material evidence" or otherwise to explain adequately his failure to seek relief earlier. *Abudu*, 485 U.S. at 104-105; see 8 C.F.R. 1003.2(c)(1) (motion "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing"). Those conclusions about the significance and adequacy of the materials submitted on reopening are subject to limited abuse-of-discretion review, see *Abudu*, 485 U.S. at 105, under which the Board's exercise of discretion survives scrutiny if it is neither "unreasoned [n]or arbitrary" and reflects "legitimate" considerations. *INS* v. *Rios-Pineda*, 471 U.S. 444, 451 (1985); *id.* at 449-451 (upholding discretionary denial of reopening on the ground that the alien satisfied a seven-year residency requirement for relief only because he delayed his removal with meritless appeals); see *Doherty*, 502 U.S. at 323-324, 326 (upholding agency's "broad discretion" in deciding whether purportedly "new" information "could have been foreseen or anticipated at the time of the earlier proceeding").

Third, "in cases in which the ultimate grant of relief is discretionary" (*e.g.*, cancellation of removal), the

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[7] To the extent that the alien's *prima facie* case turns only on a question of law, however, the Board's legal error on that question (as judged under the appropriate standard of judicial review for its legal determination) would constitute an abuse of discretion. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Board may skip the "two threshold concerns" just described and deny reopening if it concludes that the alien should not be afforded relief purely as a matter of discretion. *Abudu*, 485 U.S. at 105. That decision is also subject to abuse-of-discretion review. *Ibid.*

The Court has also held that the Board has broad "discretion in denying reopening" in other circumstances. *Rios-Pineda*, 471 U.S. at 451. In *Rios-Pineda*, the Court concluded that the Board had discretion to deny reopening based on the alien's conduct (in that case, his flagrant violation of immigration law). *Ibid.* The Court sustained the Board's ruling because its decision was not an "unreasoned or arbitrary exercise of discretion." *Ibid.*

b. The abuse-of-discretion standard also applies to judicial review of the Board's denial of an alien's request to equitably toll the filing deadline for his motion to reopen based on asserted ineffectiveness of counsel. The Board's decision to deny an equitable-tolling request is based on considerations materially similar to its consideration of reopening motions more generally. Courts therefore may review each component of the Board's tolling decision for an abuse of discretion as part of reviewing the Board's denial of the alien's motion to reopen.

The traditional concept of equitable tolling applies "only" when the party who seeks tolling demonstrates that (1) "'he has been pursuing his rights diligently'" and (2) "'some extraordinary circumstance stood in his way' and prevented timely filing." *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005)). This Court has held with respect to deadlines for court filings that although "a garden variety claim of excusable

neglect" by counsel is not an extraordinary circumstance, "far more serious instances of attorney misconduct" can "warrant equitable tolling" when they are "extraordinary." *Id.* at 651-652 (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990)).

The Board's equitable-tolling standard is similar. As the Board explained in this case, "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel." Pet. App. 7. That conclusion reflects the Board's holdings in numerous (albeit non-precedential) decisions that "generally accept[] the concept of equitable tolling" when an alien establishes "ineffective assistance of counsel," "so long as certain criteria are met, including a showing of due diligence and prejudice." *In re Diaz*, No. A074081757, 2009 WL 2981747, at *2 (B.I.A. Aug. 21, 2009). Those decisions demonstrate that the Board's discretionary decision whether to toll an alien's 90-day period for filing his motion to reopen turns on whether the alien (1) establishes due diligence and (2) satisfies the Board's criteria for ineffective assistance claims by (a) demonstrating prejudice from counsel's ineffective assistance and (b) substantially complying with the other requirements in *In re Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988).[8]

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[8] See, *e.g.*, *In re Eun Jung Nam*, No. A095436835, 2012 WL 691491, at *1 (B.I.A. Feb. 10, 2012) (non-precedential) (declining to toll reopening deadline because alien failed to demonstrate "due diligence" or "substantial compliance with the *Lozada* requirements"); *In re Soto*, No. A076519236, 2011 WL 5111710, at *1 (B.I.A. Sept. 30, 2011) (non-precedential) (explaining that "[e]quitable tolling is available if the [alien] exercised due diligence in pursuing an ineffective assistance of counsel claim," "demonstrated that she was prejudiced by prior counsel's action," and

In *Lozada*, like this case, the alien filed a motion to reopen asserting counsel's ineffectiveness after his former attorney failed to file a brief and the Board summarily dismissed the alien's appeal. 19 I. & N. Dec. at 638. *Lozada* established three procedural requirements for such motions to provide the Board with an adequate "basis [to] assess[] the substantial number of claims of ineffective assistance" presented to it. *Id.* at 639.[9] Each motion must (1) include an

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substantially complied with *Lozada*'s requirements; holding the alien failed to establish prejudice); *In re Garcia Vasquez*, No. A077763439, 2010 WL 4822956, at *2 (B.I.A. Nov. 8, 2010) (non-precedential) (tolling reopening deadline, "deem[ing] [alien's motion] timely," and granting reopening because alien showed apparent eligibility for cancellation of removal, counsel's ineffectiveness, and compliance with *Lozada*'s requirements); *In re Turk*, No. A097512902, 2010 WL 4500915, at *1 (B.I.A. Oct. 19, 2010) (non-precedential) (tolling reopening deadline and granting reopening because alien "demonstrated his diligence," prejudice, and compliance with *Lozada*'s requirements); *In re Balmeo*, No. A096728889, 2009 WL 3250432, at *1 (B.I.A. Sept. 28, 2009) (non-precedential) (same); *In re Khan*, No. A78442144, 2007 WL 2074553, at *1 (B.I.A. June 15, 2007) (non-precedential) (same).

[9] The *Lozada* factors would have been partially superseded by Attorney General Mukasey's initial decision in *In re Compean*, 24 I. & N. Dec. 710, 735-741 (2009) (prescribing new requirements). On reconsideration, however, that decision was vacated by Attorney General Holder. *In re Compean*, 25 I. & N. Dec. 1, 2-3 (2009). The Attorney General's new opinion directed the Board to "apply the pre-*Compean* standards" from *Lozada* to all motions to reopen based on allegedly deficient counsel performance and directed the initiation of a Department of Justice rulemaking to evaluate whether the *Lozada* administrative framework should be revised. *Ibid.* The Department's rulemaking agenda currently lists a projected publication date of November 2015 for the notice of proposed rulemaking. See Office of Regulatory Affairs, Office of Mgmt. & Budget, *Motions To Reopen Removal, Deportation, or*

affidavit from the alien documenting the "relevant facts," including a "detail[ed]" description of his agreement with counsel about "the actions to be taken on appeal and what counsel did or did not represent to the [alien] in this regard"; (2) show that the alien informed his (former) counsel of the allegations levied against him, afforded counsel an "opportunity to respond," and submitted any response with the motion; and (3) show that "a complaint has been filed with appropriate disciplinary authorities" with respect to any violation of counsel's "ethical or legal responsibilities" or explain why one was not filed. *Ibid.*; see *In re Assaad*, 23 I. & N. Dec. 553, 556 (B.I.A. 2003) (reaffirming *Lozada*'s requirements). The alien must also demonstrate that he was "prejudice[d]" by counsel's deficient actions or inactions. *Lozada*, 19 I. & N. Dec. at 638, 640; see *Assaad*, 23 I. & N. Dec. at 556. Among other things, the "prejudice" requirement, like the *prima-facie*-eligibility requirement for every motion to reopen, requires a showing that the alien "is eligible for the [substantive] relief sought" in the proceedings. Pet. App. 7.[10]

Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel (2014), http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201410&RIN=1125-AA68.

[10] *Lozada* based its analysis of ineffective assistance on the view that the Due Process Clause confers a right to effective counsel in immigration proceedings. 19 I. & N. Dec. at 638; see *Assaad*, 23 I. & N. Dec. at 557-559. Attorney General Mukasey's initial opinion in *Compean* rejected that constitutional conclusion, 24 I. & N. Dec. at 714, 716-727, but determined that the Department of Justice would recognize such claims for reopening as a matter of administrative discretion in the exercise of its "broad authority to reopen removal proceedings," *id.* at 727-730. When Attorney General Holder vacated that decision on reconsideration, he noted that

Each of those components of the Board's tolling analysis, like the Board's reopening determinations of which they are a part, is subject to abuse-of-discretion review. The courts of appeals thus routinely review the Board's equitable-tolling decisions for an abuse of discretion. See, *e.g.*, *Kuusk* v. *Holder*, 732 F.3d 302, 305, 307 (4th Cir. 2013); *Bead* v. *Holder*, 703 F.3d 591, 594 (1st Cir. 2013); *El-Gazawy* v. *Holder*, 690 F.3d 852, 859-860 (7th Cir. 2012); *Avagyan* v. *Holder*, 646 F.3d 672, 678 (9th Cir. 2011); *Alzaarir* v. *Attorney Gen.*, 639 F.3d 86, 91 (3d Cir. 2011) (per curiam); *Mezo* v. *Holder*, 615 F.3d 616, 622 (6th Cir. 2010).

4. The court of appeals had jurisdiction to review the Board's denial of petitioner's request for equitable tolling under the same standards that apply in judicial review of the Board's denials of motions to reopen more generally

The court of appeals had jurisdiction to review the Board's decision denying petitioner's motion to reopen in this case. The Board determined that "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel," but it rejected petitioner's request to toll his filing deadline because petitioner

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Attorney General Mukasey's constitutional analysis was "not necessary" but stated that the Department's "litigating positions" would "remain unaffected" by his order on reconsideration. *Compean*, 25 I. & N. Dec. at 2-3. The Department's longstanding litigating position is that aliens cannot establish a due-process claim based on counsel's ineffectiveness in removal proceedings because they have no constitutionally protected right to counsel in such proceedings, and that any remedy for deficient conduct by counsel must therefore be derived from the Board's administrative framework for reopening claims. See, *e.g.*, Br. in Opp. at 16-17, *Merchant* v. *Holder*, 134 S. Ct. 1276 (2014) (No. 13-400); Gov't Br. at 10-12, *Afanwi* v. *Holder*, 558 U.S. 801 (2009) (No. 08-906).

failed to establish that he was prejudiced by his counsel's ineffectiveness. Pet. App. 7. More specifically, the Board concluded that reopening was unwarranted because petitioner's motion failed to show that petitioner was eligible for cancellation-of-removal relief if removal proceedings were reopened and, for that reason, petitioner failed to show prejudice from his counsel's failure to file an appellate brief with the Board. *Id.* at 7-9.

That determination by the Board that petitioner's reopening motion failed to establish a *prima facie* case of "eligib[ility] for the [underlying] relief" that he would be seeking in reopened proceedings, Pet. App. 7, is parallel to the Board's evaluation of an alien's showing of a *prima facie* case for such underlying relief in any motion to reopen. The standard of review of that determination—abuse of discretion—is therefore the same as in any other case in which the Board denies a motion to reopen because it finds the alien's *prima facie* case for relief insufficiently established by the evidentiary material or other submissions accompanying the motion.

Just as courts of appeals have jurisdiction to review such denials when the alien's motion to reopen is filed within the 90-day period, they have jurisdiction to review the same type of denials when the alien's motion is filed after 90 days have passed. In other words, whether or not the Board erred in its tolling decision in this case, the court of appeals had jurisdiction to decide that question in the course of resolving the merits of petitioner's petition for review.

B. The Court Of Appeals Erred In "Construing" Petitioner's Request To The Board For Equitable Tolling Of The Deadline For His Motion To Reopen As Only An Invitation That The Board Reopen Proceedings On Its Own Motion

1. The Board's decision whether to equitably toll an alien's reopening-motion deadline is different from a determination whether to reopen proceedings sua sponte

The court of appeals' conclusion that it lacked jurisdiction to review the Board's order denying petitioner's motion to reopen rested on the court's mistaken view that petitioner's request that the Board equitably toll the filing deadline for his motion to reopen should be "construed" as merely an invitation to the Board to "reopen the removal proceedings *sua sponte*," *i.e.*, on the Board's own motion. See Pet. App. 2. That artificial recharacterization of the issue on which the Board based its no-tolling decision was erroneous and suffers from multiple defects.

First, and most fundamentally, the recharacterization does not reflect how the Board decided this case. The Board specifically concluded that "the time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel," Pet. App. 7, and proceeded to evaluate petitioner's tolling request on its own terms. A court engaged in judicial review of agency action must "confin[e] [its] review to a judgment upon the validity of the grounds upon which the [*agency*] *itself* based its action." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (emphasis added). The court of appeals' transformation of the agency's decision into a hypothetical one that the court could not review fun-

damentally misconceives the proper nature of judicial review of agency action.

Second, the Board treats an equitable-tolling request in an alien's motion to reopen as distinct from a suggestion that the Board exercise its separate power to reopen proceedings on its own motion. The Board not infrequently will first address the merits of an alien's request for equitable tolling and then separately decide whether the case is a candidate for *sua sponte* reopening.[11] Indeed, the last paragraph of the

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[11] See, *e.g.*, *In re Guzman-Vasquez*, No. A044002033, 2014 WL 1118477, at *1 (B.I.A. Feb. 18, 2014) (non-precedential) (ruling that "[e]quitable tolling is unavailable" because alien failed to establish tolling was warranted and "also conclud[ing] that sua sponte reopening would be inappropriate"); *In re Medina-Hernandez*, No. A097743520, 2014 WL 1120190, at *3 (B.I.A. Feb. 7, 2014) (non-precedential) (affirming IJ's denial of untimely motion to reopen because, "even if the [alien] established a meritorious claim for equitable tolling, she has not otherwise satisfied the motion to reopen requirements"; separately affirming IJ's conclusion that *sua sponte* reopening was unwarranted); *In re Avila-Santoyo*, No. A088920938, 2013 WL 6921647, at *4-*5 (B.I.A. Dec. 12, 2013) (non-precedential) (ruling that the Board "need not address the underlying merits of [the alien's] motion to reopen" because the motion was untimely and "equitable tolling is not warranted" because alien was not diligent; separately concluding that "sua sponte reopening is not warranted"), pet. for review denied, 579 Fed. Appx. 860 (11th Cir. 2014); *Eun Jung Nam*, 2012 WL 691491, at *2 (concluding that tolling was unwarranted before stating in the final paragraph that the alien also failed to identify a basis "to grant her request to reopen these proceedings sua sponte"); *Soto*, 2011 WL 5111710, at *1 (concluding that tolling was unwarranted before stating in the last paragraph that, "[f]inally, we will not exercise our sua sponte authority"); *Garcia Vasquez*, 2010 WL 4822956, at *1 (declining to revisit prior rejection of alien's suggestion "to reopen *sua sponte*" but finding equitable tolling warranted such that the alien's reopening "motion is deemed timely").

Board's decision in this very case reflects the Board's distinct conclusion, after having determined that tolling was unwarranted (Pet. App. 7-9), that this case did not present an occasion for it to exercise its authority to "reopen on [its] own motion." *Id.* at 9 (quoting *In re J-J-*, 21 I. & N. Dec. 976, 984 (B.I.A. 1997)). That distinct treatment of equitable tolling and *sua sponte* reopening underscores the fundamental difference between those concepts in the Board's decisions.

Third, the Board's authority to equitably toll the 90-day filing deadline for an *alien's motion* to reopen is logically and doctrinally distinct from the Board's independent authority to reopen removal proceedings "on its *own motion*," 8 C.F.R. 1003.2(a) (emphasis added). The concept of tolling necessarily concerns a filing deadline that is applicable to the party seeking to file, and in this context the only such deadline is the 90-day period within which *the alien* may file *his* motion to reopen. 8 U.S.C. 1229a(c)(7)(C)(i); 8 C.F.R. 1003.2(c)(2). "Tolling" is a non-sequitur when the Board considers whether to exercise its *sua sponte* authority, which permits the Board to reopen a case "on its own motion" "at any time." 8 C.F.R. 1003.2(a). It thus makes no sense to "construe" petitioner's tolling request as an invitation to the Board to reopen proceedings on its own motion on the basis of equitable tolling.

Finally, whether or not the Board erred in its equitable-tolling ruling has no bearing on the court of appeals' jurisdiction to review that ruling. Even if a reviewing court were to conclude that the Board lacks authority to toll an alien's 90-day deadline to file a motion to reopen (contrary to the unanimous view of every court of appeals that has resolved the issue, see

Kuusk, 732 F.3d at 305), the court would still possess jurisdiction to review a ruling by the Board denying a request for equitable tolling as part of a decision denying the alien's motion to reopen. In that situation, the correct disposition of the alien's petition for review would be to deny the petition *on its merits* because the Board did not err in denying tolling. On the other hand, if a reviewing court concludes that the Board generally does possess authority to equitably toll the 90-day filing deadline for an alien to file a motion to reopen, the proper course is to review the Board's *exercise* of that authority for an abuse of discretion. Either way, the court of appeals has jurisdiction to review a Board decision that denies equitable tolling. The court of appeals in this case erred in its contrary conclusion.

2. The Court should remand to allow the court of appeals to resolve this case on its merits

a. Because the narrow question presented in this Court is whether the court of appeals had "jurisdiction to review Petitioner's request that the Board equitably toll the 90-day deadline on his motion to reopen," Pet. i, this case presents no occasion for the Court to resolve the underlying merits question whether the Board may apply equitable tolling in this context. "[T]he fact that petitioner discussed this issue in the text of his petition for certiorari does not bring it before [the Court]," because this Court's "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for [the Court's] review," *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (citation and brackets omitted), and the question here is specifically limited to the question of jurisdiction.

If this Court reverses the court of appeals' jurisdictional ruling and remands this case for further proceedings, the court of appeals will be able to address the merits of this case. Because it is still an open question in the Fifth Circuit whether equitable tolling can extend the statutory 90-day deadline for an alien's filing of a motion to reopen, the court of appeals can resolve that question on remand; if it concludes the Board does have that authority, it can proceed to review the Board's denial of reopening for an abuse of discretion. Alternatively, the court of appeals could assume *arguendo* that tolling exists and review the Board's two bases for determining that petitioner failed to show prejudice from the asserted ineffectiveness of his counsel. See, *e.g.*, *Xue Su Wang* v. *Holder*, 750 F.3d 87, 90 (1st Cir. 2014) (reviewing Board's tolling decision on that assumption). If petitioner remains aggrieved after such proceedings on the merits, he may seek further review.

Allowing such matters to be resolved in the first instance on remand is the appropriate course. Although "[e]very circuit to have addressed the issue" has concluded that "the principles of equitable tolling apply" to an alien's deadline for filing "a motion to reopen removal proceedings," *Kuusk*, 732 F.3d at 305 (4th Cir.), the court of appeals in this case is one of the two courts of appeals with jurisdiction to review final orders of removal that has yet to resolve the question in a precedential decision.[12] The Fifth Circuit has

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[12] See, *e.g.*, *Avila-Santoyo* v. *United States Att'y Gen.*, 713 F.3d 1357, 1359 (11th Cir. 2013) (en banc) (per curiam); *Rashid* v. *Mukasey*, 533 F.3d 127, 130-131 (2d Cir. 2008); *Barry* v. *Mukasey*, 524 F.3d 721, 724-725 (6th Cir. 2008); *Yuan Gao* v. *Mukasey*, 519 F.3d 376, 377-378 (7th Cir. 2008); *Valeriano* v. *Gonzales*, 474 F.3d

addressed the issue in unpublished, non-precedential decisions reaching conflicting results, but nothing in those non-binding decisions would preclude the court of appeals from resolving that question afresh.

In *Torabi* v. *Gonzales*, 165 Fed. Appx. 326, 331 (2006) (per curiam) (unpublished), the Fifth Circuit followed the unanimous judgment of the other courts of appeals to have addressed the issue and concluded that the "doctrine of equitable tolling" applies and can toll the filing deadline for an alien's motion to reopen. Later, in *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (5th Cir. 2008) (per curiam) (unpublished), the court stated that "equitable tolling is not a basis for filing an untimely * * * motion [to reopen] under the statute or regulations," but the court provided no analysis and cited no authority to support that conclusion. The *Lin* court then determined that, because it had held tolling to be unavailable, Lin's argument that his filing deadline "should have been equitably tolled based on ineffective assistance of counsel * * * is in essence an argument that the [Board] should have exercised its discretion to reopen proceedings sua sponte based

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669, 673-674 (9th Cir. 2007); *Hernandez-Moran* v. *Gonzales*, 408 F.3d 496, 499-500 (8th Cir. 2005); *Borges* v. *Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005); *Riley* v. *INS*, 310 F.3d 1253, 1258 (10th Cir. 2002). The First Circuit has "not yet decided whether equitable tolling can suspend the time limits applicable to motions to reopen." *Xue Su Wang*, 750 F.3d at 90.

The D.C. and Federal Circuits do not conduct judicial review under Section 1252. Such review occurs only in those regional courts of appeals in which an immigration judge holds removal proceedings, 8 U.S.C. 1252(b)(2), and no removal proceedings are held in the District of Columbia, see U.S. Dep't of Justice, *EOIR Immigration Court Listing* (Jan. 2015), http://www.justice.gov/eoir/sibpages/ICadr.htm.

upon the doctrine of equitable tolling." *Ibid.* And because the Fifth Circuit had previously held (like its sister circuits) that it lacks jurisdiction to review the Board's wholly discretionary decision not to reopen proceedings *sua sponte*, the court dismissed for want of jurisdiction. *Ibid.*[13]

The Fifth Circuit later issued a precedential decision that adopted the second portion of *Lin* that recharacterized tolling requests as requests for *sua sponte* reopening. But in doing so, the court of appeals neither discussed nor resolved whether the Board has authority to equitably toll an alien's reopening-motion deadline. The court simply stated that "a request for equitable tolling of a time- or number-barred motion to reopen on the basis of ineffective assistance of counsel is 'in essence an argument that the [Board] should have exercised its discretion to reopen the proceeding sua sponte based upon the

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[13] The Board's decision not to exercise its authority to reopen proceedings *sua sponte* is not subject to judicial review because the *sua sponte* reopening regulation confers no private rights and no judicially manageable standards exist for reviewing such a decision, which is committed to agency discretion by law, see 5 U.S.C. 702(a)(2). All 11 courts of appeals exercising jurisdiction under Section 1252 agree that "the Board's decision not to reopen removal proceedings *sua sponte*" is "unreviewable." *Kucana*, 558 U.S. at 251 n.18 (noting decisions but expressing no opinion on the question); cf. *Brotherhood of Locomotive Eng'rs*, 482 U.S. at 282 (noting "the impossibility of devising an adequate standard of review" of an agency decision not to reconsider a decision for material error and holding that such a decision is unreviewable under 5 U.S.C. 701(a)(2)). One court of appeals has held that a Board decision that reopens proceedings *sua sponte* adversely to the alien, unlike a Board decision not to reopen, is subject to limited judicial review. *Chehazeh* v. *Attorney Gen.*, 666 F.3d 118, 127-130 (3d Cir. 2012).

doctrine of equitable tolling.'" *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008) (quoting *Lin*, 286 Fed. Appx. at 150). And based on that limited holding, the court concluded that it "lack[ed] jurisdiction to review the [Board's] denial[] of [the alien's] motions to reopen" and declined to "reach [his] equitable tolling * * * arguments on their merits." *Ibid.*

The court of appeals in this case followed *Ramos-Bonilla*, "construed" petitioner's tolling request to be an invitation to the Board to engage in *sua sponte* reopening, and dismissed for want of jurisdiction. Pet. App. 2-3. If this Court were to reverse that jurisdictional holding and remand for the court of appeals to review the Board's denial of equitable tolling on its own terms, the court of appeals would be able to consider in the first instance whether the Board has authority to equitably toll an alien's deadline for filing a motion to reopen. That merits issue, as noted above, is not before this Court because it lies outside the question presented. Indeed, review of that question would be unwarranted at this time even if it were otherwise presented because the court of appeals has never issued a reasoned decision, let alone a precedential one, holding that the Board lacks authority to toll the alien's filing deadline. Cf. *Holland*, 560 U.S. at 654 ("[T]his is a court of final review and not first view.") (citation omitted).[14]

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[14] This Court recently denied a petition for a writ of certiorari arising from the Fifth Circuit that asked the Court to decide whether an alien's 90-day deadline to file a motion to reopen is subject to equitable tolling. See *Whiteley* v. *Holder*, 135 S. Ct. 675 (2014); see also Gov't Br. in Opp. at 19-20, *Whiteley*, *supra* (No. 14-

b. We note, however, that the government agrees with petitioner (Pet. 17) that the time within which an alien may file a motion to reopen may be equitably tolled by the Board. The availability of tolling is warranted because the Board has permissibly incorporated such tolling into its procedures implementing the INA's administrative removal process.

To the extent that petitioner has relied on decisions applying equitable tolling in judicial proceedings (see Pet. 17), those decisions do not control the availability of tolling in administrative proceedings. This Court's decision in *Irwin* articulated a "rebuttable presumption of equitable tolling" based on the Court's view that the presumption is normally a "realistic assessment of legislative intent." *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827 (2013) (quoting *Irwin*, 498 U.S. at 95-96). This Court has since applied that presumption in certain contexts involving "time limits for filing suit in federal court." *Ibid.* But the Court has "never applied the *Irwin* presumption to an *agency*'s internal * * * deadline" for seeking review of an earlier agency decision. *Ibid.* (emphasis added). That distinction between court- and agency-filing deadlines reflects two related features of administrative law.

First, administrative tribunals and courts are different in "origin and function" and their differences "'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976) (quoting *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 142-143 (1940));

5188) (explaining that the question is still open in the Fifth Circuit).

see, *e.g.*, *INS* v. *Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam) (holding that when a reviewing court concludes that the Board erred, it must "remand to the agency for additional" proceedings with only "rare" exception; the reviewing court's resolution of issues not yet resolved by the Board "seriously disregard[s] the agency's legally mandated role") (citation omitted); *Wallace Corp.* v. *NLRB*, 323 U.S. 248, 253 (1944) (refusing to "incorporat[e] the judicial concept of estoppel into [the agency's] procedure"). Unlike a court's review of "the action of a lower court," which forms "one phase of a single unified process," judicial review of an agency decision implicates "the distribution of authority made by Congress" in conferring substantive power on the agency and granting circumscribed review to the courts. *Pottsville Broad. Co.*, 309 U.S. at 141; see *id.* at 144 (applying principles developed during court review of lower court rulings to agencies would be to interpret "the laws of Congress through the distorting lenses of inapplicable legal doctrine").

Second, it is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978). It has long been settled that "the formulation of [such] procedures [i]s basically to be left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments." *Id.* at 524; see, *e.g.*, *Pottsville Broad. Co.*, 309 U.S. at 143. Implicit in Congress's grant of administrative decision-making power is the "determination that administrative agencies * * * will be in a better position than federal courts or Congress itself to design procedural

rules adapted to the peculiarities of the * * * tasks of the agency involved." *Vermont Yankee*, 435 U.S. at 525 (quoting *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965)). For that reason, courts presume that "Congress intend[s] that the discretion of the *agencies* and not that of the courts be exercised in determining" whether to impose additional procedural protections beyond those granted by statute. *Id.* at 546.

As a result, the governing presumption in this administrative context is that Congress intends to vest an administrative agency with both authority to construe its governing statute and discretion to develop its own tolling procedures for the time to seek internal agency review (or reopening) of an earlier agency decision, because the agency is in a "better position than federal courts or Congress itself to design [its own] procedural rules." *Vermont Yankee*, 435 U.S. at 525 (citation omitted).

The INA does not preclude the Attorney General (or the Board as his delegee) from adopting tolling principles in this context. Significantly, when Congress enacted the 90-day deadline in Section 1229a(c)(7)(C)(i) in 1996, it did not disturb the long tradition of Board authority to reopen removal proceedings at any time. For at least half a century, the Board has been authorized to reopen at any time any removal proceeding in which it rendered a decision. See 8 C.F.R. 1003.2(a) (authorizing Board to reopen "any case" in which it has rendered a decision on its own motion "at any time"); 8 C.F.R. 3.2(a) (1997) (adopted Apr. 1996) (same); 8 C.F.R. 3.2 (1996) (adopted Jan. 1962) (authorizing Board and IJ to reopen "any case" in which a decision has been made on its own motion with no deadline). This Court had also

confirmed before 1996 that the Board has "broad discretion" in deciding whether to reopen proceedings. See, *e.g.*, *Doherty*, 502 U.S. at 317; *Rios-Pineda*, 471 U.S. at 449. Given that the Board retained authority and broad discretion to reopen proceedings on its own motion at any time, it would be anomalous to conclude that Congress intended to prevent the Board from exercising discretion to apply equitable tolling principles to, and to consider the merits of, an otherwise untimely motion to reopen filed by an alien.

The foregoing considerations, however, are not before the Court at this time.[15] The court of appeals merely concluded that it lacked jurisdiction to entertain petitioner's challenge to the Board's denial of his motion to reopen. That jurisdictional holding was erroneous.

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[15] The Court is currently considering the availability of equitable tolling of the two-year and six-month time limits for filing an administrative claim and subsequent suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.* See *United States* v. *Wong*, No. 13-1074 (argued Dec. 10, 2014); *United States* v. *June*, No. 13-1075 (argued Dec. 10, 2014).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOYCE R. BRANDA
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
DONALD E. KEENER
PATRICK J. GLEN
Attorneys

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APPENDIX

1. 5 U.S.C. 701 (APA § 10 introductory clause) provides in pertinent part:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

* * * * *

2. 5 U.S.C. 706 (APA § 10(e)) provides in pertinent part:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * * *

3. 8 U.S.C. 1229a (INA § 240) provides in pertinent part:

Removal proceedings

(a) Proceeding

(1) In general

An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.

* * * * *

(3) Exclusive procedures

Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States. Nothing in this section shall affect proceedings conducted pursuant to section 1228 of this title.

* * * * *

(b) Conduct of proceeding

* * * * *

(5) Consequences of failure to appear

(A) In general

Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in

absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection (e)(2) of this section). The written notice by the Attorney General shall be considered sufficient for purposes of this subparagraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title.

* * * * *

(C) Rescission of order

Such an order may be rescinded only—

(i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

The filing of the motion to reopen described in clause (i) or (ii) shall stay the removal of the alien pending disposition of the motion by the immigration judge.

(D) Effect on judicial review

Any petition for review under section 1252 of this title of an order entered in absentia under this paragraph shall (except in cases described in section 1252(b)(5) of this title) be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable.

* * * * *

(c) Decision and burden of proof

* * * * *

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application

form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

* * * * *

(7) Motions to reopen

(A) In general

An alien may file one motion to reopen proceedings under this section, except that this limitation shall not apply so as to prevent the filing of one motion to reopen described in subparagraph (C)(iv).

(B) Contents

The motion to reopen shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material.

(C) Deadline

(i) In general

Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal.

(ii) Asylum

There is no time limit on the filing of a motion to reopen if the basis of the motion is to apply for relief under sections[1] 1158 or 1231(b)(3) of this title and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding.

(iii) Failure to appear

The filing of a motion to reopen an order entered pursuant to subsection (b)(5) of this section is subject to the deadline specified in subparagraph (C) of such subsection.

(iv) Special rule for battered spouses, children, and parents

Any limitation under this section on the deadlines for filing such motions shall not apply—

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[1] So in original.

(I) if the basis for the motion is to apply for relief under clause (iii) or (iv) of section 1154(a)(1)(A) of this title, clause (ii) or (iii) of section 1154(a)(1)(B) of this title,,[1] section 1229b(b) of this title, or section 1254(a)(3) of this title (as in effect on March 31, 1997);

(II) if the motion is accompanied by a cancellation of removal application to be filed with the Attorney General or by a copy of the self-petition that has been or will be filed with the Immigration and Naturalization Service upon the granting of the motion to reopen;

(III) if the motion to reopen is filed within 1 year of the entry of the final order of removal, except that the Attorney General may, in the Attorney General's discretion, waive this time limitation in the case of an alien who demonstrates extraordinary circumstances or extreme hardship to the alien's child; and

(IV) if the alien is physically present in the United States at the time of filing the motion.

The filing of a motion to reopen under this clause shall only stay the removal of a qualified alien (as defined in section 1641(c)(1)(B) of this

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[1] So in original.

title[2] pending the final disposition of the motion, including exhaustion of all appeals if the motion establishes that the alien is a qualified alien.

* * * * *

(e) Definitions

In this section and section 1229b of this title:

(1) Exceptional circumstances

The term "exceptional circumstances" refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien.

(2) Removable

The term "removable" means—

(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 1182 of this title, or

(B) in the case of an alien admitted to the United States, that the alien is deportable under section 1227 of this title.

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[2] So in original. A closing parenthesis probably should appear.

4. 8 U.S.C. 1229b (INA § 240A) provides in pertinent part:

Cancellation of removal; adjustment of status

* * * * *

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

* * * * *

5. 8 U.S.C. 1252 (INA § 242) provides in pertinent part:

Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of Title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

* * * * *

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

* * * * *

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158(b)(1)(B), 1229a(c)(4)(B), or 1231(b)(3)(C) of this title, unless the court finds, pursuant to with subsection (b)(4)(B) of this section, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

* * * * *

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

* * * * *

6. 8 C.F.R. 1003.2 provides in pertinent part:

Reopening or reconsideration before the Board of Immigration Appeals.

(a) *General.* The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief.

* * * * *

(c) *Motion to reopen.* (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears

that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in § 1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. 1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

(2) Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3) of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

(3) In removal proceedings pursuant to section 240 of the Act, the time limitation set forth in paragraph (c)(2) of this section shall not apply to a motion to reopen filed pursuant to the provisions of § 1003.23(b)(4)(ii). The time and numerical limitations set forth in paragraph

(c)(2) of this section shall not apply to a motion to reopen proceedings:

(i) Filed pursuant to the provisions of § 1003.23(b)(4)(iii)(A)(1) or § 1003.23(b)(4)(iii)(A)(2);

(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or in the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing;

(iii) Agreed upon by all parties and jointly filed. Notwithstanding such agreement, the parties may contest the issues in a reopened proceeding; or

(iv) Filed by the Service in exclusion or deportation proceedings when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(f) of this chapter.

(4) A motion to reopen a decision rendered by an Immigration Judge or Service officer that is pending when an appeal is filed, or that is filed while an appeal is pending before the Board, may be deemed a motion to remand for further proceedings before the Immigration Judge or the Service officer from whose decision the appeal was taken. Such motion may be consolidated with, and considered by the Board in connection with, the appeal to the Board.

* * * * *

7. 8 C.F.R. 1003.23 provides in pertinent part:

Reopening or reconsideration before the Immigration Court.

* * * * *

(b) *Before the Immigration Court*—(1) *In general.* An Immigration Judge may upon his or her own motion at any time, or upon motion of the Service or the alien, reopen or reconsider any case in which he or she has made a decision, unless jurisdiction is vested with the Board of Immigration Appeals. Subject to the exceptions in this paragraph and paragraph (b)(4), a party may file only one motion to reconsider and one motion to reopen proceedings. A motion to reconsider must be filed within 30 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before July 31, 1996, whichever is later. A motion to reopen must be filed within 90 days of the date of entry of a final administrative order of removal, deportation, or exclusion, or on or before September 30, 1996, whichever is later. A motion to reopen or to reconsider shall not be made by or on behalf of a person who is the subject of removal, deportation, or exclusion proceedings subsequent to his or her departure from the United States. Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider shall constitute a withdrawal of such motion. The time and numerical limitations set forth in this paragraph do not apply to motions by the Service in removal proceedings pursuant to section 240 of the Act. Nor shall

such limitations apply to motions by the Service in exclusion or deportation proceedings, when the basis of the motion is fraud in the original proceeding or a crime that would support termination of asylum in accordance with § 1208.22(e) of this chapter.

* * * * *

(iv) *Replies to motions; decision.* The Immigration Judge may set and extend time limits for replies to motions to reopen or reconsider. A motion shall be deemed unopposed unless timely response is made. The decision to grant or deny a motion to reopen or a motion to reconsider is within the discretion of the Immigration Judge.

* * * * *

(3) *Motion to reopen.* A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material. Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents. A motion to reopen will not be granted unless the Immigration Judge is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing. A motion to reopen for the purpose of providing the alien an opportunity to apply for any form of discretionary relief will not be granted if it appears that the alien's right to apply for such relief was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief

is sought on the basis of circumstances that have arisen subsequent to the hearing. Pursuant to section 240A(d)(1) of the Act, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 240A(a) (cancellation of removal for certain permanent residents) or 240A(b) (cancellation of removal and adjustment of status for certain nonpermanent residents) may be granted only if the alien demonstrates that he or she was statutorily eligible for such relief prior to the service of a notice to appear, or prior to the commission of an offense referred to in section 212(a)(2) of the Act that renders the alien inadmissible or removable under sections 237(a)(2) of the Act or (a)(4), whichever is earliest. The Immigration Judge has discretion to deny a motion to reopen even if the moving party has established a prima facie case for relief.

(4) *Exceptions to filing deadlines*—(i) *Asylum and withholding of removal.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply if the basis of the motion is to apply for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or withholding of removal under the Convention Against Torture, and is based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. The filing of a motion to reopen under this section shall not automatically stay the removal of the alien. However, the alien may request a stay and, if granted by the Immigration Judge, the alien shall not be removed pending disposition of the motion by

the Immigration Judge. If the original asylum application was denied based upon a finding that it was frivolous, then the alien is ineligible to file either a motion to reopen or reconsider, or for a stay of removal.

(ii) *Order entered in absentia or removal proceedings.* An order of removal entered in absentia or in removal proceedings pursuant to section 240(b)(5) of the Act may be rescinded only upon a motion to reopen filed within 180 days after the date of the order of removal, if the alien demonstrates that the failure to appear was because of exceptional circumstances as defined in section 240(e)(1) of the Act. An order entered in absentia pursuant to section 240(b)(5) may be rescinded upon a motion to reopen filed at any time if the alien demonstrates that he or she did not receive notice in accordance with sections 239(a)(1) or (2) of the Act, or the alien demonstrates that he or she was in Federal or state custody and the failure to appear was through no fault of the alien. However, in accordance with section 240(b)(5)(B) of the Act, no written notice of a change in time or place of proceeding shall be required if the alien has failed to provide the address required under section 239(a)(1)(F) of the Act. The filing of a motion under this paragraph shall stay the removal of the alien pending disposition of the motion by the Immigration Judge. An alien may file only one motion pursuant to this paragraph.

(iii) *Order entered in absentia in deportation or exclusion proceedings.* (A) An order entered in absentia in deportation proceedings may be rescinded only upon a motion to reopen filed:

(*1*) Within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances beyond the control of the alien (e.g., serious illness of the alien or serious illness or death of an immediate relative of the alien, but not including less compelling circumstances); or

(*2*) At any time if the alien demonstrates that he or she did not receive notice or if the alien demonstrates that he or she was in federal or state custody and the failure to appear was through no fault of the alien.

(B) A motion to reopen exclusion hearings on the basis that the Immigration Judge improperly entered an order of exclusion in absentia must be supported by evidence that the alien had reasonable cause for his failure to appear.

(C) The filing of a motion to reopen under paragraph (b)(4)(iii)(A) of this section shall stay the deportation of the alien pending decision on the motion and the adjudication of any properly filed administrative appeal.

(D) The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen filed pursuant to the provisions of paragraph (b)(4)(iii)(A) of this section.

(iv) *Jointly filed motions.* The time and numerical limitations set forth in paragraph (b)(1) of this section shall not apply to a motion to reopen agreed upon by all parties and jointly filed.

No. 14-185

In the Supreme Court of the United States

NOEL REYES MATA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI
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REPLY BRIEF FOR THE RESPONDENT

The court of appeals held that it lacked jurisdiction to review the decision of the Board of Immigration Appeals (Board or BIA) denying petitioner's untimely motion to reopen his removal proceedings. Pet. App. 2-3. The court reasoned that (1) its precedent required that it "construe[]" petitioner's "request for equitable tolling" of the 90-day deadline for filing a motion to reopen under 8 U.S.C. 1229a(c)(7)(C)(i) as an invitation to the Board to reopen proceedings on its *own* motion (*sua sponte*) under Board regulations, and (2) courts lack jurisdiction to review Board determinations declining to reopen *sua sponte*. Pet. App. 2-3. In light of its jurisdictional holding, the court of appeals emphasized that it did not "address the merits of [petitioner's] equitable-tolling * * * claims." *Id.* at 3.

The government's opening brief explains (at 16-28) that the court of appeals erred because it does have jurisdiction to review the Board's denial of an alien's motion to reopen under 8 U.S.C. 1229a(c)(7)(C)(i), including when the alien seeks review of the Board's denial of equitable tolling of the 90-day filing deadline. The government's brief explains (at 29-32) that the court of appeals further erred by recharacterizing the Board's equitable-tolling decision as one resolving a different question, *i.e.*, whether the Board should reopen the proceedings *sua sponte*. A remand is thus warranted to allow the court of appeals to exercise its jurisdiction to address the merits of petitioner's equitable-tolling arguments in the first instance. Gov't Br. 32-36.

The Court-appointed Amicus Curiae dedicates most of his argument to the merits of petitioner's request for tolling, arguing that the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, does not allow the 90-day statutory deadline for motions to reopen to be equitably tolled. Br. 14-34. Amicus contends (Br. 3) that this extended, "initial inquiry" into the merits is necessary to resolve "the ultimate question * * * whether the Fifth Circuit properly dismissed the petition [for review] for want of jurisdiction." Resolution of the merits of the equitable-tolling issue, the argument continues (Br. 35-40), justifies the court of appeals' decision to construe the Board's rejection of petitioner's equitable-tolling contentions as an agency decision denying *sua sponte* reopening. The latter determination, Amicus explains (Br. 40-43), is not subject to judicial review.

That analysis is erroneous. The court of appeals' *jurisdiction* to review a Board decision addressing

equitable tolling does not depend on resolving the *merits* of the equitable-tolling issue. Indeed, the court of appeals here made clear that it did not "address the merits of [petitioner's] equitable-tolling * * * claims." Pet. App. 3. This Court thus granted certiorari on the limited question whether the court of appeals had "*jurisdiction* to review Petitioner's request that the Board equitably toll" his filing deadline. See Pet. i (emphasis added). Moreover, a court conducting judicial review of an agency order is not free to reformulate the basis for the agency's decision as the Fifth Circuit did here. The court's task on review is to assess "the propriety of [agency] action solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (*Chenery II*); accord *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) (*Chenery I*). Because the court of appeals did have jurisdiction to review the Board's denial of equitable tolling as part of reviewing the Board's denial of reopening, but failed to address petitioner's arguments that the Board erred in denying equitable tolling, this Court should reverse and remand for further proceedings.

A. The Court Of Appeals' Jurisdiction Does Not Depend On Its Resolution Of The Merits Of The Equitable-Tolling Issue

The fundamental premise of Amicus's argument (Br. 3) is that the court of appeals' jurisdiction to review the Board's equitable-tolling decision depends on the outcome of the merits, *i.e.*, on whether the 90-day deadline for an alien to file a motion to reopen "is subject to equitable tolling" under the INA. That premise is incorrect.

"Jurisdiction is power to declare the law." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)

(quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). It is therefore well settled that a court lacks authority "to pronounce upon the meaning * * * of a state or federal law" when it lacks jurisdiction, and that "to do so is, by very definition, for [the] court to act ultra vires." *Id.* at 101-102. It follows that a court's determination of its own "subject-matter jurisdiction necessarily *precedes* a ruling on the merits," not vice versa. *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (emphasis added). Cf. *id.* at 584-585 (explaining that a court need not resolve whether it has subject-matter jurisdiction when it can rule on other "threshold grounds for denying audience to a case on the merits").

Amicus contends (Br. 37), however, that if the filing deadline for petitioner's "motion to reopen cannot be equitably tolled" under the INA, then "petitioner's only route to relief" before the Board would have been to suggest that the Board exercise its distinct authority to reopen his case on its own motion (because no deadline applies to the Board's own exercise of its *sua sponte* reopening authority). And a determination not to reopen *sua sponte*, Amicus continues (Br. 40-43), is not subject to judicial review. But the court of appeals' *jurisdiction* to review the Board's denial of petitioner's motion to reopen does not turn on whether petitioner's request for equitable tolling should fail on the merits. Even if the court of appeals were to conclude—contrary to every court of appeals to have resolved the issue (see Gov't Br. 33 & n.12)—that the 90-day deadline for filing a motion to reopen is *not* subject to equitable tolling, that conclusion would merely provide a basis for *upholding* the Board's denial of reopening *on the merits*, *i.e.*, for ruling that

the Board's denial of the alien's untimely motion to reopen was not erroneous. See *id.* at 31-32.

Amicus's argument that the court of appeals' jurisdiction turns on the availability of equitable tolling before the Board is also inconsistent with the decision under review. Petitioner argued below that the deadline for filing his motion to reopen was subject to equitable tolling, Pet. C.A. Br. 7-15, but the Fifth Circuit recognized that it could not resolve the merits of those arguments if it lacked jurisdiction over his petition for review. The court thus emphasized that it did not "address the merits of [petitioner's] equitable-tolling * * * claims" because it had determined that it "lack[ed] jurisdiction to review the [Board's] denial of [petitioner's] untimely motion to reopen." Pet. App. 3.

Moreover, the Fifth Circuit has yet to resolve in a precedential decision whether equitable tolling applies in this context. Although Amicus asserts (Br. 2, 10) that Fifth Circuit "precedent" holds that an alien's reopening "deadline cannot be equitably tolled," no such binding precedent exists. Amicus apparently relies (Br. 10) on the Fifth Circuit's unpublished (and unexplained) disposition in *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (2008) (per curiam). See Gov't Br. 34. But that decision, like every unpublished Fifth Circuit decision issued after 1995, is "not precedent." 5th Cir. R. 47.5.4; see *Poliner* v. *Texas Health Sys.*, 537 F.3d 368, 381 n.44 (5th Cir. 2008), cert. denied, 555 U.S. 1149 (2009). Moreover, even if such unpublished decisions were precedential, the Fifth Circuit's earlier, unpublished "hold[ing] that the doctrine of equitable tolling applies" to an alien's reopening deadline, *Torabi* v. *Gonzales*, 165 Fed. Appx. 326, 331 (2006) (per

curiam); see Gov't Br. 34—not the subsequent panel decision in *Lin*—would be the relevant circuit precedent. See *United States* v. *Ocean Bulk Ships, Inc.*, 248 F.3d 331, 340 n.2 (5th Cir. 2001) (explaining that "the holding of the first panel to address an issue is the law of th[e] Circuit" and "bind[s] all subsequent panels" until overruled en banc or by this Court) (citation omitted), cert. denied, 534 U.S. 1065 (2001). Accordingly, as previously explained (Gov't Br. 35-36 & n.14), the Fifth Circuit has yet to resolve whether the deadline for an alien to file a motion to reopen may be equitably tolled.

Since 2008, the Fifth Circuit's precedent has required Fifth Circuit panels (a) to "construe" a request to equitably toll the deadline for an alien's motion to reopen as a suggestion that the Board reopen proceedings on its own motion, and then (b) to dismiss a challenge to the Board's denial of reopening because the denial of *sua sponte* reopening is not subject to judicial review. *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008). Although Amicus asserts (Br. 14 n.2) that the "premise" for the Fifth Circuit's "construal rule" is that equitable tolling is unavailable, the Fifth Circuit has never adopted that view in a published decision. See Gov't Br. 35-36. In fact, in unpublished decisions after *Ramos-Bonilla* in which the Fifth Circuit has assumed *arguendo* that it had "jurisdiction to review the [Board]'s denial of equitable tolling," the court has upheld the Board's decisions not on the ground that tolling is unavailable, but on the basis that the alien failed to show "the type of due diligence" required for equitable tolling, *Ibarra-Gonzalez* v. *Holder*, 542 Fed. Appx. 341, 342 (2013) (per curiam), or failed to satisfy the *Lozada* require-

ments[1] for establishing an underlying claim of counsel ineffectiveness, *Gotora* v. *Holder*, 567 Fed. Appx. 219, 222 n.1 (2014) (per curiam).

In short, Amicus errs in concluding that the jurisdictional question presented in this case turns on the resolution of the merits. That contention incorrectly puts the merits cart before the jurisdictional horse and cannot be reconciled with the Fifth Circuit's own recognition that it lacks authority to determine whether equitable tolling is available if it lacks jurisdiction to review the Board's denial of such tolling.

B. The Court Of Appeals Erred In Recharacterizing The Board's Equitable-Tolling Decision As A Decision Addressing Only *Sua Sponte* Reopening

Even assuming *arguendo* that an alien's reopening deadline is never subject to equitable tolling, the Fifth Circuit erred in "constru[ing]" petitioner's motion to the Board to reopen proceedings by equitably tolling the 90-day deadline as a request to the Board to reopen proceedings on its own motion, Pet. App. 2a. That artificial recharacterization of the basis for the Board's decision contravenes settled principles governing judicial review of agency orders. See Gov't Br. 29-31.

1. This Court has long recognized the "fundamental rule of administrative law" that a court conducting judicial review of agency action "must judge the propriety of [that] action solely by the grounds invoked by the agency." *Chenery II*, 332 U.S. at 196; see, *e.g.*, *Burlington Truck Lines, Inc.* v. *United States*, 371

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[1] See Gov't Br. 25-26 (discussing the requirements in *In re Lozada*, 19 I. & N. Dec. 637, 638-640 (B.I.A. 1988), for establishing counsel ineffectiveness).

U.S. 156, 168-169 (1962) ("*Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself."); *Chenery I*, 318 U.S. at 87-88 (holding that "an administrative order must be judged [by the grounds] upon which the record discloses that [the agency] action was based" and that a court must therefore confine its "review to a judgment upon the validity of the grounds upon which the [agency] itself based its action"). That rule of judicial review is so fundamental that this Court has twice summarily reversed the Ninth Circuit when it sought to resolve an alien's petition for review on grounds different than those addressed by the Board. See *Gonzales* v. *Thomas*, 547 U.S. 183, 186-187 (2006) (per curiam); *INS* v. *Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam).

Amicus does not appear to dispute that principle. Amicus instead argues (Br. 39-40) that the *Chenery* rule "only 'pertains to the basis that a court may use for the affirmance of agency action that is reviewable' and 'has nothing whatever to do with whether agency action is reviewable.'" Br. 39 (quoting *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987)) (emphasis omitted). Although Amicus is correct that the *Chenery* rule does not itself address whether agency action is reviewable, that point lends no support to the court of appeals' decision in this case.

In *Locomotive Engineers*, this Court addressed a statutory provision that expressly authorized an interested party to "petition [the Interstate Commerce Commission (ICC)] to reopen and reconsider an action of the Commission" in certain rail-carrier proceedings. 482 U.S. at 278 (quoting 49 U.S.C. 10327(g) (1982) (repealed 1995)). The Court concluded that

although a party could obtain limited APA review of the agency's denial of a petition for "reopening on the basis of new evidence or changed circumstances," *id.* at 278, 284, no review was available if the agency "refus[ed] to reconsider [its action] for material error" because such a decision on reconsideration is "'committed to agency discretion by law,'" *id.* at 282, 284 (quoting 5 U.S.C. 701(a)(2)). In so ruling, the Court explained that although *Chenery* requires a reviewing court to limit its review to "the basis the agency used" to justify its action, the *Chenery* rule "has nothing whatever to do with whether agency action is reviewable" and, thus, did not support the (erroneous) view that "[agency] action becomes reviewable" "if the agency gives a 'reviewable' reason for [an] otherwise unreviewable action." *Id.* at 283 (emphasis omitted).[2]

That understanding of the *Chenery* rule has no application here. To be sure, the *Chenery* rule does not directly address whether the Board's denial of an

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[2] The Court illustrated its point by explaining that a prosecutor's "failure to prosecute an alleged criminal violation" based on the belief that "the law will not sustain a conviction" is not subject to review, even though the prosecutor's legal rationale is "an eminently 'reviewable' proposition, in the sense that courts are well qualified to consider the point." *Locomotive Eng'rs*, 482 U.S. at 283. The same holds true when the Board declines to reopen a case on its own motion. Just as a citizen has no right to compel a prosecutor to pursue criminal charges or to obtain judicial review of the prosecutor's decision not to do so, see *ibid.*; see also *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973), the regulation recognizing the Board's *sua sponte* reopening authority confers no private right to compel the Board to make its *own* motion to reopen the proceedings and no cognizable right to obtain judicial review of the Board's determination not to do so. See Gov't Br. 35 n.13. Both types of action are committed to agency discretion. See p. 21, *infra*.

alien's request to equitably toll the reopening deadline is subject to judicial review. But it does require that a reviewing court restrict its review of the Board's decision to the "grounds invoked by the agency." *Chenery II*, 332 U.S. at 196. Even Amicus acknowledges (Br. 39) that a court may not "affirm" agency action on grounds on which the agency might have, but did not, base its decision. The Fifth Circuit has disregarded that basic rule of administrative law by "constru[ing]" (Pet. App. 2a) the Board's denial of equitable tolling as something that it was not: an agency determination not to reopen proceedings *sua sponte*.

2. Amicus argues (Br. 39) that the court of appeals' "construal" rule is permissible because there is "no question that the Board treated petitioner's [reopening] motion as an invitation to reopen on the Board's [own] motion." But that misses the point. The Board, as it often does, *both* resolved the merits of petitioner's motion to reopen, which sought equitable tolling of petitioner's filing deadline, *and* additionally considered whether to reopen the proceedings on its own motion. See Gov't Br. 10-11, 30-31 & n.11. Although the government agrees that the court of appeals lacked authority to review the Board's decision not to exercise its *sua sponte* reopening authority, that conclusion does not justify the Fifth Circuit's decision to disregard the Board's *distinct* ruling on petitioner's motion to reopen by treating the Board's decision as merely considering whether to accept an invitation to reopen the proceedings on its own motion.

3. Amicus explains (Br. 35-37) that when a litigant files a claim, petition, or motion with a court, the court may possess authority to construe the litigant's contentions in a manner favorable to the litigant. That

practice, however, does not authorize a court conducting judicial review of agency action to disregard the very basis on which the agency expressly resolved a motion filed in agency proceedings.

This Court's decision in *Locomotive Engineers* does not suggest otherwise. As Amicus recognizes (Br. 36-37), *Locomotive Engineers* concluded that a court could review the ICC's denial of a petition (*i.e.*, motion) that "sought reopening on the basis of new evidence or changed circumstances," but that no judicial review was available of an ICC order denying a petition seeking "reconsider[ation] for material error" because that particular determination was committed to agency discretion by law within the meaning of 5 U.S.C. 701(a)(2). See 482 U.S. at 282, 284. In that limited sense, *Locomotive Engineers* concluded that the availability of APA review can depend on the "basis on which the 'petition * * * sought [relief].'" Amicus Br. 36-37 (quoting 482 U.S. at 284). But nothing in *Locomotive Engineers* suggests that the reviewing court could have "construed" the agency's resolution of a motion to reopen on the basis of new evidence (which was subject to review) as an agency denial of a motion for reconsideration based on material error (which was not). The bedrock rule of administrative law reflected in *Chenery* is that a reviewing court must review agency action on its own terms. The Fifth Circuit failed to do so here.

If the court of appeals had correctly reviewed the Board's denial of equitable tolling on its own terms rather than "construing" the Board's decision as one involving only the denial of *sua sponte* reopening, the court would have had no basis for dismissing this case for want of jurisdiction. The only basis for the court's

jurisdictional holding was that a decision by the Board denying *sua sponte* reopening is not subject to review. No similar jurisdictional hurdle exists when a court reviews the Board's denial of equitable tolling.

C. The Merits Of Petitioner's Equitable-Tolling Arguments Are Not Before This Court

1. The question presented to this Court is whether the court of appeals erred by holding that it lacks "jurisdiction to review Petitioner's request that the Board equitably toll the 90-day deadline on his motion to reopen as a result of ineffective assistance of counsel under 8 C.F.R. § 1003.2(c)(2)." Pet. i. That question should be resolved in the affirmative for the reasons given above. The separate issue on the merits—whether the Board has discretion to equitably toll the deadline for an alien to file a motion to reopen—lies outside the question presented, which does not turn on the merits of this case. As a result, the merits issues that Amicus has briefed (at 14-34) are simply not before this Court.

Amicus cites this Court's Rule 15.2 to suggest (Br. 14 n.2) that the government has waived its argument that the issue whether petitioner's reopening deadline is subject to equitable tolling is not properly before the Court, because the government did not make that argument before certiorari was granted. That is incorrect. Rule 15.2 provides that "[a]ny [nonjurisdictional] objection to consideration of a *question presented* based on what occurred in the proceedings below * * * may be deemed waived unless called to the Court's attention in the brief in opposition." (emphasis added). The Question Presented in this case, however, is expressly limited to the question of the court of appeals' "jurisdiction." Pet. i. The govern-

ment had no objection to the question on which review was sought, and no obligation to root out statements in the certiorari petition that may have strayed beyond the question that petitioner himself presented. Any other rule would encourage future petitioners to embed similar statements in the body of their certiorari petitions in an attempt to have this Court resolve numerous issues that would lie beyond the petitioners' own formulations of the Questions Presented.

Amicus notes (Br. 14 n.2) that the body of petitioner's certiorari petition not only addressed jurisdiction but also discussed the merits of the equitable-tolling issue. That additional discussion, however, does not alter the question that petitioner himself formulated and presented to this Court for review. See Pet. i. Indeed, it is settled that "the fact that petitioner discussed this issue in the text of his petition for certiorari does not bring it before [the Court]," because "Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for [the Court's] review." *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (citation and brackets omitted); see Gov't Br. 32.

2. Although the question whether the Board has discretion to equitably toll the 90-day deadline for an alien to file a motion to reopen is thus not presented to this Court, the government has explained that its position is that 8 U.S.C. 1229a(c)(7)(C)(i) does not foreclose the Board from exercising such discretion to apply equitable tolling in appropriate cases. Gov't Br. 37-40. Amicus has focused the majority of his efforts (Br. 14-34) on this merits issue, which should be addressed by the court of appeals in the first instance on remand. Gov't Br. 32-36. Nevertheless, as explained

below, the government disagrees with Amicus's conclusion that the INA forecloses the Board from equitably tolling the reopening deadline.

a. Amicus argues (Br. 15-16) that Congress prohibited the Attorney General (or the Board exercising his delegated authority) from equitably tolling the 90-day deadline in 8 U.S.C. 1229a(c)(7)(C)(i) because the text of that provision specifies that the alien's motion to reopen "shall be filed" within the 90-day period and because Congress provided exceptions to the deadline that do not include an exception for equitable tolling. When viewed in its full context, however, Section 1229a(c)(7)(C) does not unambiguously prohibit the Attorney General from construing the Act to permit equitable tolling of the reopening deadline.

First, the statute is silent with respect to equitable tolling. Nothing in Section 1229a(c)(7)(C) expressly addresses whether the Attorney General may equitably toll the time to file a reopening motion.

Moreover, the statutory exceptions to the 90-day deadline reflect specific, categorical considerations that the Attorney General may reasonably conclude are distinct in kind from those advanced by equitable tolling. The statutory exceptions eliminate the reopening deadline altogether for (a) certain categories of asylum applications; (b) cases involving certain types of battered spouses, children, and parents; and (c) aliens who never received the requisite notice of the underlying removal proceedings or who could not have appeared in the removal proceedings because they were incarcerated. 8 U.S.C. 1229a(b)(5)(C)(ii) and (c)(7)(C)(ii)-(iv). Congress also increased the reopening deadline by a fixed amount (to 180 days) for certain other aliens ordered removed *in absentia*. See

8 U.S.C. 1229a(b)(5)(C)(i), (c)(7)(C)(iii), and (e)(1). Those exceptions do not speak directly to whether Congress would have intended to prohibit the Attorney General from exercising discretion to toll the 90-day deadline for aliens who have diligently pursued their rights but who confronted exceptional circumstances that prevented them from filing timely.

Moreover, if Congress had intended to foreclose the exercise of such discretion, it would not have allowed both the Department of Homeland Security (DHS) and the Board to allow the administrative reopening of proceedings after the statutory deadline had passed. Amicus acknowledges (Br. 34 n.8) that DHS may "waive the [alien's 90-day reopening] deadline." Because nothing in the relevant regulation restricts DHS's ability to "waive" that deadline, DHS may do so for any reason it deems appropriate. See 8 C.F.R. 1003.2(c)(3)(iii). Amicus further concedes that the Board has authority "'to apply *equitable tolling principles* to, and to consider the merits of, an otherwise untimely motion to reopen,'" so long as the Board does so under the rubric of exercising its "*sua sponte* authority." Amicus Br. 27 (quoting Gov't Br. 40) (emphasis added). But there is no reason to believe that Congress would have intended *to prohibit* the Board from exercising discretion to toll a reopening deadline by relying on principles of equitable tolling yet *to allow* the Board to "apply equitable tolling principles" to reach the same outcome so long as it invokes its *sua sponte* authority. That flaw in Amicus's position shows that the broader legal context governing reopening of removal proceedings undermines Amicus's contention that Congress intended to foreclose the Attorney General from allowing equitable tolling of

the statutory deadline in appropriate circumstances. See Gov't Br. 39-40.

b. i. Amicus correctly notes (Br. 27-28) that the Board has yet to issue a published decision addressing the application of equitable tolling to an alien's motion-to-reopen deadline. Cf. Gov't Br. 24 & n.8 (explaining that the Board's equitable-tolling rulings have been in non-precedential decisions).[3] But in the initial opinion in *In re Compean*, Attorney General Mukasey both noted that the courts of appeals had "h[eld] that the reopening deadline may be equitably tolled" for deficient attorney performance and independently concluded that "the Board may exercise its discretion to allow tolling of the 90-day [reopening] period * * * if the alien affirmatively shows that he exercised due diligence in discovering and seeking to cure his lawyer's alleged deficient performance." 24 I. & N. Dec. 710, 732 (A.G. 2009), vacated, 25 I. & N. Dec. 1 (A.G. 2009). Although Attorney General Holder vacated the *Compean* decision on reconsideration and directed the initiation of rulemaking to address the "framework for reviewing motions to reopen immigration proceedings based on claims of ineffective assistance of counsel," 25 I. & N. Dec. at 2; see Gov't Br. Gov't Br. 25-26 nn.9-10, the government's position here—in the absence of a precedential Board decision—is that the Board has discretion to equitably toll the

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[3] The Board has issued no published decisions analyzing the availability of equitable tolling in any immigration context, and we have identified only three of its published decisions that have used any variant of the phrase "equitable tolling." See *In re Estrada*, 26 I. & N. Dec. 180, 186 (2013); *In re J-G-*, 26 I. & N. Dec. 161, 162 (2013); *In re Assaad*, 23 I. & N. Dec. 553, 566 n.2 (2003) (Filppu, Board Member, concurring).

reopening deadline.[4] Notably, every court of appeals to have resolved the issue has held equitable tolling to be appropriate in this context. See Gov't Br. 33 & n.12.

To be clear, the government does not seek *Chevron* deference for that conclusion because no binding agency decision presently resolves the issue. Cf. Amicus Br. 28. It bears repeating, however, that the question whether the reopening deadline is subject to equitable tolling is a *merits* issue not presented in this case, which concerns only the court of appeals' jurisdiction to review the Board's decision. See pp. 12-13, *supra*. But even if the issue were presented, the appropriate course would not be for this Court to resolve that question in the first instance. Where "the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, 'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009) (quoting *Thomas*, 547 U.S. at 186).

No unusual circumstances would warrant a departure from that rule in this case. Indeed, even the court of appeals here has itself yet to resolve the merits of the equitable-tolling issue in a reasoned or precedential opinion. Gov't Br. 34-35; pp. 5-6, *supra*.

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[4] The Department of Justice is pursuing the rulemaking process that the Attorney General directed in *Compean*. The Department's notice of proposed rulemaking is currently pending review by the Office of Management and Budget. See Office of Info. & Regulatory Affairs, Office of Mgmt. & Budget, *Motions To Reopen Removal, Deportation, or Exclusion Proceedings Based Upon a Claim of Ineffective Assistance of Counsel*, RIN 1125-AA68 (2015), http://www.reginfo.gov/public/do/eoDetails?rrid=125038.

Moreover, judicial resolution of issues bearing on equitable tolling without the benefit of a precedential agency decision could potentially be overtaken by subsequent regulatory action. Cf. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-985 (2005). When the Attorney General or the Board addresses in a future precedential adjudicatory decision or rulemaking proceeding whether and to what extent equitable-tolling principles apply in this context, the agency would not be bound to follow exactly the tolling rules that have been adopted for court proceedings. The agency could instead choose to define differently the contours of the tolling standards and procedures that would apply in its own administrative adjudications. See Gov't Br. 37-39 (discussing *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), and the fundamental difference between procedural rules for agency adjudications and rules developed by courts for court proceedings). Such agency procedures could, for instance, specify the type of prejudice from counsel ineffectiveness that an alien would have to show to justify tolling, or could establish an outer time limit on the availability of tolling. Cf. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 821, 828 (2013) (upholding an agency regulation imposing a three-year maximum "good cause" extension of a 180-day statutory deadline to file an administrative appeal).

ii. Amicus incorrectly asserts (Br. 31-32) that the government has "change[d] its interpretation" after rejecting "the availability of equitable tolling" in earlier rulemaking proceedings. In April 1996, before Congress enacted 8 U.S.C. 1229a(c)(7)(C), the Attorney General concluded in rulemaking proceedings that

"a 'good cause exception' would [not] be an appropriate procedural mechanism" for extending an alien's reopening deadline under the Department's regulations, and she noted that the Board's authority to reopen cases *sua sponte* was "a mechanism" that may be used to address certain cases presenting exceptional circumstances. 61 Fed. Reg. 18,902 (Apr. 29, 1996). That rejection of a "good cause" standard did not resolve the distinct question whether 8 U.S.C. 1229a(c)(7)(C)—which Congress enacted five months *later* in September 1996[5]—must be construed to foreclose the Board from exercising discretion to equitably toll an alien's reopening deadline.

A "good cause" standard applies in numerous contexts. See, *e.g.*, Fed. R. Civ. P. 4(m) (extension of deadline to serve process), 6(b)(1) (extension of deadlines set forth in the Federal Rules of Civil Procedure, local rules, and certain statutes), 26(a)(3)(B) (extension of deadline for certain discovery objections). And although its meaning may vary somewhat based on the particular context and "procedures involved," the phrase "good cause" generally refers to a "[l]egally sufficient ground or reason" the determination of which is left "largely in the [tribunal's] discretion." *Black's Law Dictionary* 692 (6th ed. 1990). As a result, a "good cause" standard often encompasses a broad spectrum of reasons deemed sufficient to warrant an extension of time. See, *e.g.*, 4B Charles Alan Wright et al., *Federal Practice and Procedure* § 1165, at 608 (2015) (explaining that courts will normally

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[5] See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3), 110 Stat. 3009-593 (adding 8 U.S.C. 1229a(c)(6)(C) (2000), which is now designated as Section 1229a(c)(7)(C)).

grant extensions under Rule 6(b) "in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party"); see also *Pace* v. *DiGuglielmo*, 544 U.S. 408, 416 (2005) ("A [habeas] petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute 'good cause' for him to file in federal court.").

The traditional equitable-tolling standard, by contrast, is much more circumscribed. It applies "only" when the party seeking tolling has demonstrated that (1) "'he has been pursuing his rights diligently'" and (2) "'some extraordinary circumstance [both] stood in his way' and prevented timely filing." *Holland* v. *Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace*, 544 U.S. at 418); see *Pace*, 544 U.S. at 416, 418 (separately addressing "good cause" and "equitable tolling"); see also, *e.g.*, *Livingston Powdered Metal, Inc.* v. *NLRB*, 669 F.2d 133, 136 (3d Cir. 1982) ("good cause" standard is "less stringent" than an "'extraordinary circumstances' test"); *NLRB* v. *Zeno Table Co.*, 610 F.2d 567, 569 (9th Cir. 1979) (similar).

This Court has concluded that a court's authority to grant relief under a "good cause standard does not by itself necessarily imply that any other reason for [the same relief]—for example, on the basis of traditional equitable principles—is precluded." *Miller* v. *French*, 530 U.S. 327, 340 (2000). The Attorney General's determination that a "good cause exception" was unwarranted under regulations governing reopening similarly does not imply that the subsequently enacted Section 1229a(c)(7)(C)(i) must be construed to foreclose the Attorney General from allowing equitable tolling for a more limited set of cases. Nor did the Attorney General's description in those earlier rule-

making proceedings of the Board's *sua sponte* reopening authority as "a mechanism" for addressing certain cases suggest it is the only mechanism Section 1229a(c)(7)(C)(i) allows for addressing otherwise untimely reopening requests.

3. Finally, we note that the government agrees with Amicus—and all 11 courts of appeals with jurisdiction to review the Board's decisions—that the Board's decision not to reopen proceedings on its *own* motion is not subject to judicial review. See Gov't Br. 35 n.13; Amicus Br. 40-43. The Board's *sua sponte* reopening regulation (8 C.F.R. 1003.2(a)) confers no private right either to seek or to compel the Board to make its *own* motion to reopen proceedings. A Board determination declining to act on its own motion in any particular proceeding is an action committed to agency discretion by law, regardless of the Board's legal rationale for its determination. See p. 9 & n.2, *supra* (discussing *Locomotive Eng'rs*, *supra*). Moreover, the absence of judicially manageable standards for judging the Board's refusal to act *sua sponte* to reopen proceedings independently reinforces the conclusion that such decisions are not subject to judicial scrutiny. See *Locomotive Eng'rs*, 482 U.S. at 283 ("[T]he impossibility of devising an adequate standard of review" "confirm[s]" that agency action is not subject to review.); Gov't Br. 35 n.13.

But this case does not involve *sua sponte* reopening. As Amicus acknowledges (Br. 40 n.10), petitioner expressly disclaimed any argument that the Board's denial of *sua sponte* reopening is subject to judicial review. The certiorari petition makes clear that petitioner did not "disagree[]" with the Fifth Circuit's holding "that the Board's *sua sponte* discretion is un-

reviewable," and that petitioner "only * * * disagrees" with the court of appeals' independent conclusion that "a request for equitable tolling is equivalent to a request for *sua sponte* power." Pet. 6. Although petitioner may have since reconsidered that concession, see Pet. Br. 26-27 (suggesting that the Board's denial of *sua sponte* reopening may be subject to review), petitioner has affirmatively waived any contrary position in this Court.

In the end, this case boils down to one simple point: The court of appeals erred in construing the Board's denial of petitioner's reopening motion, which sought equitable tolling of petitioner's filing deadline, as a different type of Board determination about whether to reopen proceedings on the Board's own motion.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

APRIL 2015

REPLY BRIEF

No. 14-185

IN THE

Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MARK C. FLEMING
SYDENHAM B. ALEXANDER, III
NICOLE FONTAINE DOOLEY
JEFFERY A. HABENICHT
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

JASON D. HIRSCH
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

CLAIRE M. BERGERON
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

RAED GONZALEZ
Counsel of Record
NAIMEH SALEM
SHERIDAN GREEN
BRUCE GODZINA
GONZALEZ OLIVIERI LLC
2200 Southwest Fwy.
Suite 550
Houston, TX 77098
(713) 481-3040
rgonzalez@gonzalezolivierillc.com

ADDITIONAL COUNSEL LISTED ON INSIDE COVER

BRIAN K. BATES
REINA & BATES
123 Northpoint Drive
Suite 190
Houston, TX 77060

ALEXANDRE I. AFANASSIEV
QUAN LAW GROUP
544 Westheimer Street
Suite 1750
Houston, TX 77056

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IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

INTRODUCTION

The question presented is one of jurisdiction: whether the Fifth Circuit has power to review the BIA's rejection of Mr. Mata's request for equitable tolling of the 90-day statutory period for moving to reopen removal proceedings on grounds of ineffective assistance of counsel. Pet. i. As the government and every other circuit to decide the question agree, the answer to that question is yes—an answer compelled by the governing jurisdictional statutes, this Court's decision in *Kucana* v. *Holder*, 558 U.S. 233 (2010), and the presumption of judicial review of agency action.

The Court-appointed Amicus embraces many of these principles. *E.g.*, Amicus Br. 2 ("Courts generally have jurisdiction to review the Board's denial of a statutory motion to reopen." (citing *Kucana*)); *id.* 17 (agreeing that the 90-day deadline "is not jurisdictional"). Amicus's argument for affirmance depends on changing the question presented to the *merits* question whether the 90-day filing period can be tolled, which Amicus urges be answered in a manner contrary to the position of the BIA, the government, and all courts of appeals that have addressed the matter. Even if the Court reaches the availability of tolling, reversal is still warranted.

THE COURT OF APPEALS HAS JURISDICTION TO REVIEW THE BIA'S EQUITABLE TOLLING DETERMINATION

A. The Court Need Only Decide The Question Of Jurisdiction

Petitioner and the government have explained why the statutory provisions governing judicial review of removal orders, read in light of settled canons of interpretation, give the court of appeals jurisdiction to review BIA decisions denying motions to reopen, including decisions refusing to toll the 90-day filing period of 8 U.S.C. § 1229a(c)(7)(C)(i). *See* Pet. Br. 14-17; Resp. Br. 15-28. That is a sufficient basis for this Court to reverse the decision below. The Court need go no further.

Amicus invites the Court to decide whether "the 90-day statutory deadline for filing a motion to reopen [is] subject to equitable tolling." Br. i. That question was not presented for review, and for good reason: The Fifth Circuit ruled that it "lack[ed] jurisdiction to review" the BIA's denial of Mr. Mata's motion to reopen and that it "need not address the merits of Mr. Mata's equitable-tolling, ineffective-assistance-of-counsel, and

due-process claims." Pet. App. 3. The petition for certiorari was accordingly limited to jurisdiction. Pet. i. The general availability of equitable tolling—a proposition that the BIA decided in Mr. Mata's favor (Pet. App. 7), that the government does not dispute (Resp. Br. 23-24), and that the Fifth Circuit did not address (Pet. App. 3)—is not before the Court.[1]

Nor is the availability of equitable tolling "fairly include[d]" in this jurisdictional appeal. Amicus Br. 14 n.2. A court's jurisdiction to decide a dispute is a threshold question to be decided before and apart from the merits. *E.g.*, *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-431 (2007) ("jurisdictional questions ordinarily must precede merits determinations in dispositional order"); *Great S. Fire Proof Hotel Co.* v. *Jones*, 177 U.S. 449, 453 (1900) ("On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes.").

This Court has rejected efforts to address a question not presented in the petition, even where the petition "presuppose[d]" the answer. *Limelight Networks, Inc.* v. *Akamai Techs., Inc.*, 134 S. Ct. 2111, 2120 (2014). Therefore, even if Amicus were correct that the availability of equitable tolling formed the "premise of" the question presented (Br. 14 n.2), that would not warrant a ruling on the issue. And it is hardly clear that the Fifth Circuit's jurisdictional ruling was "premise[d]" on a view that the 90-day motion to reopen deadline can-

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[1] Contrary to Amicus's argument (Br. 14 n.2), the petition's final sentence did not "confirm[] that the scope of the question presented includes the availability of equitable tolling." That sentence was directed to "*jurisdiction* to review BIA denials of requests for equitable tolling." Pet. 26-27 (emphasis added).

not be tolled. No published Fifth Circuit decision so holds; the only precedential opinion in this area, *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008), states merely that requests for tolling are treated as requests for *sua sponte* reopening. *See Matter of Chavez-Guzman*, 2012 WL 6968959, at *1 (BIA Dec. 13, 2012) ("[T]he Fifth Circuit has not addressed in a published decision whether the motion time limitations may be equitably tolled in cases claiming ineffective assistance of counsel."). Amicus relies on language in *Lin* v. *Mukasey*, 286 F. App'x 148, 150 (5th Cir. 2008) (per curiam), stating that "equitable tolling is not a basis for filing an untimely or numerically-barred motion." *Lin* at most reveals an intra-circuit conflict in unpublished decisions regarding the availability of equitable tolling. *See Torabi* v. *Gonzales*, 165 F. App'x 326, 330-331 (5th Cir. 2006) (per curiam) (reversing the BIA's denial of equitable tolling as an abuse of discretion).

The uncertainty about the Fifth Circuit's position on the availability of equitable tolling reinforces that this is not a "most exceptional case[]" in which the Court should consider a question not clearly raised in the petition. *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 28 (1993) (per curiam); *see also Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("Ordinarily, this Court does not decide questions not ... resolved in the lower court."). The Court may therefore answer the question presented by ruling that the court of appeals had appellate jurisdiction, reversing the judgment, and remanding for consideration of Mr. Mata's appeal on the merits.[2]

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[2] Another reason to refrain from addressing the merits question in the first instance is the possibility that the issue may be resolved without this Court's intervention. On remand, the Fifth

In the event the Court chooses to go further, the merits arguments raised by Amicus are addressed in the balance of this brief.

B. The 90-Day Period Is Subject To Tolling Under Multiple Theories, Each Of Which Results In Appellate Jurisdiction To Review The BIA's Decision

Although the Court need not consider the merits of the BIA's authority to toll the 90-day period, doing so does not warrant affirmance. Reversal remains appropriate here regardless of whether the availability of equitable tolling is compelled as a matter of statutory interpretation (as we contend), is a permissible implementation of the 90-day statutory period by the BIA (as the government contends), or is an exercise of the BIA's regulatory authority to reopen proceedings *sua sponte* (as Amicus contends).

1. The 90-day deadline is subject to tolling as a matter of statutory interpretation

a. The 90-day deadline is a statute of limitations

As Petitioner showed (Br. 18), and Amicus agrees (Br. 17), the 90-day filing period for motions to reopen under 8 U.S.C. § 1229a(c)(7)(C)(i) is not jurisdictional. Such a time limit is accordingly "subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland* v. *Florida*, 560 U.S. 631, 645-646 (2010) (quoting

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Circuit could well agree with the BIA and all circuits to have addressed the matter that the 90-day deadline is subject to tolling. Furthermore, the Attorney General plans to issue a rule on the subject this year. Resp. Br. 25 n.9.

Irwin v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)).

Amicus resists application of the rebuttable presumption of equitable tolling on the theory that the 90-day period is not a "statute of limitations"—a category Amicus defines narrowly to include only provisions "govern[ing] when suit must be initiated, a claim filed, or an action brought," based on "the date when the claim accrued." Amicus Br. 21 (internal quotation marks omitted). But the Court has never defined the category of tollable statutory periods so narrowly.

In *Young* v. *United States*, 535 U.S. 43 (2002), the Court found tollable a three-year "lookback period" in the Bankruptcy Code, 11 U.S.C. § 507(a)(8)(A)(i). The lookback period was not a period in which "suit must be initiated, a claim filed, or an action brought." Amicus Br. 21. Rather, it defined the period for which the IRS may collect back taxes from a debtor who files for bankruptcy; tax debts due for years before the "lookback period" are dischargeable in bankruptcy. *See Young*, 535 U.S. at 47. The "lookback period" did not prescribe when the IRS must initiate a suit. It nonetheless qualified as a tollable "limitations period because it prescribes a period within which certain rights (namely, priority and nondischargeability in bankruptcy) may be enforced." *Id.* The lookback period was thus "presumed" to have been drafted in light of the background principle of equitable tolling. *Id.* at 49; *see also* Wood, *A Treatise on the Limitation of Actions at Law and in Equity* 1 (Moore ed., 4th ed. 1916) ("[s]tatutes of limitation are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, *or within which certain rights may be enforced*" (emphasis added)).

Young is only the most recent case in which this Court has recognized the possibility of tolling other deadlines that do not fit into Amicus's narrow definition of a statute of limitations. *See, e.g.*, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393-394 (1982) (90-day period for filing a "charge" with the EEOC in a Title VII case—a prerequisite for a later lawsuit—is "like a statute of limitations" and is "subject to waiver, estoppel, and equitable tolling"); *Irwin*, 498 U.S. at 94-96 (filing deadline that was measured not from the date the claim accrued, but from notice of final action from the EEOC, was a "time limit[]" subject to equitable tolling); *United States* v. *Locke*, 471 U.S. 84, 94 n.10 (1985) ("Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling."); *Honda* v. *Clark*, 386 U.S. 484, 493 n.8 (1967) (noting, in dicta, that dismissal of an administrative action for failure to comply with a 45-day limit to resubmit certificates of deposit "would be open to attack on lines similar to those we hold require tolling the statute of limitations").

If Amicus's narrow definition of the time periods subject to equitable tolling were correct, this Court's opinion in *Sebelius* v. *Auburn Regional Medical Center*, 133 S. Ct. 817 (2013), would have been much shorter. The deadline at issue there was the "statutory 180-day limitation" for filing an appeal from an administrative decision to another body within the agency. *Id.* at 821. That appeal period in no way defined the time to file a suit; if that were a necessary characteristic of a "statute of limitations" presumptively subject to equitable tolling, then the Court's rejection of the lower court's tolling decision could have rested on that ground alone. Instead, this Court expressly referred to the 180-day deadline as a "limitations period," *id.* at

823, and provided a detailed explanation of why that specific deadline was unlike those held presumptively subject to tolling in cases like *Irwin* and *Zipes*, *id.* at 827-828. "Such reasoning would have been gratuitous," *Zipes*, 455 U.S. at 397, if the 180-day deadline had been categorically untollable because it was not a "statute of limitations" as Amicus defines the term.

The question, therefore, is not whether the 90-day deadline of 8 U.S.C. § 1229a(c)(7)(C)(i) governs the filing of a suit, but rather whether "it prescribes a period within which certain rights ... may be enforced." *Young*, 535 U.S. at 47.[3]

The 90-day deadline for motions to reopen fits comfortably within the Court's definition. The Court has emphasized that "the statutory right to reopen," *Dada* v. *Mukasey*, 554 U.S. 1, 5 (2008), serves as "an important safeguard intended to ensure a proper and lawful disposition of immigration proceedings," *Kucana* v. *Holder*, 558 U.S. 233, 242 (2010) (internal quotation marks omitted). *See also, e.g.*, *Dada*, 554 U.S. at 15 (IIRIRA "guarantees to each alien the right to file 'one motion to reopen proceedings'"). And there is no question that the 90-day limit prescribes the time in which

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[3] Contrary to Amicus's assertion (Br. 20), this does not mean that every time period in a federal statute is presumptively subject to tolling. A deadline does not qualify if the statutory relief remains available after the deadline's expiration. *See Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1234 (2014). Neither would a statutory waiting or notice period. *See Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27-28 (1989). Moreover, not all "statutes of limitations" will be subject to tolling; if a limitations period is drafted in a "highly detailed technical manner," *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997), or is "unusually generous," *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998), tolling will be unavailable.

that "right[] ... may be enforced," *Young*, 535 U.S. at 47; after that time, absent circumstances that call for equitable relief, the statutory right to reopen is no longer available.

The purposes served by the 90-day deadline further demonstrate that it falls within this Court's definition of a presumptively tollable statute of limitations. The deadline "serves the same basic policies [furthered by] all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Young*, 535 U.S. at 47 (internal quotation marks omitted). Instead of allowing reopening years after the fact, the statute requires noncitizens to present any new evidence with haste. The deadline also protects the government's interest in finality. *See* Amicus Br. 34 (recognizing that the 90-day limitation provides "repose").

Accordingly, it is no surprise that every circuit to have addressed the merits question whether the 90-day deadline may be equitably tolled has concluded that it may. *See* Pet. Br. 21-22. Many of them expressly recognize the deadline as a "statute of limitations" or "limitations period." *E.g.*, *Kuusk* v. *Holder*, 732 F.3d 302, 305 (4th Cir. 2013) ("[Section] 1229a(c)(7)(C)(i) sets forth a limitations period that can be equitably tolled."); *Gaberov* v. *Mukasey*, 516 F.3d 590, 594 (7th Cir. 2008) ("The 90-day deadline is a statute of limitations and therefore subject to equitable tolling."); *Socop-Gonzalez* v. *INS*, 272 F.3d 1176, 1193 (9th Cir. 2001) (en banc) ("Congress intended the filing period for motions to reopen to operate as a statute of limitations"); *Iavorski* v. *INS*, 232 F.3d 124, 129, 134 (2d Cir. 2000) (describing deadline as a "statute of limitations" and "limitations period"). We have located no decision that has adopted Amicus's contrary position.

b. *The presumption of equitable tolling applies to the statutory 90-day deadline*

Because the 90-day filing period for motions to reopen is a "statute of limitations" properly defined, it is "subject to a rebuttable presumption in *favor* of equitable tolling." *Holland*, 560 U.S. at 645-646 (internal quotation marks omitted). Amicus (Br. 23) and the government (Br. 37-39) resist that conclusion on the basis that this case involves an agency. But this Court has found administrative deadlines presumptively subject to equitable tolling, *see, e.g.*, *Zipes*, 455 U.S. at 393, and expressed its approval for doing so (albeit in dicta) in *Honda*, 386 U.S. at 493 n.8.

The application of equitable tolling in agency cases is no different from other situations in which equitable doctrines designed by courts have been applied to the administrative context. For example, this Court applied the "relation back" doctrine—which "has its roots in the former federal equity practice," *Scarborough* v. *Principi*, 541 U.S. 401, 418 (2004) (internal quotation marks omitted)—to hold that an EEOC charge due within a statutory period could be "verified" by the filer after the deadline. *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 115-117 (2002). The Court found "tacit" endorsement by Congress of the application of relation back in the administrative context from the fact that Congress presumably knew of "this settled judicial treatment" of verification requirements. *Id.* at 117. The Court emphasized that the distinction between courts and agencies was inconsequential for purposes of applying the equitable doctrine: "[I]f relation back is a good rule for courts of law, it would be passing strange to call it bad for an administrative agency." *Id.* at 116.

The BIA itself has a long history of applying equitable doctrines. For example, the BIA has repeatedly invoked "the more far-reaching equitable remedy of granting relief *nunc pro tunc*." *Iavorski*, 232 F.3d at 130 n.4. The pedigree of equitable *nunc pro tunc* adjudication in immigration cases dates back to *Matter of L-*, 1 I. & N. Dec. 1, 6 (A.G. 1940), in which then-Attorney General Robert Jackson ruled that the statutory authority to waive a noncitizen's inadmissibility could be exercised "*nunc pro tunc*" after the noncitizen had entered the country and was in deportation proceedings, even though the statutory provision by its terms did not apply to deportable aliens. *See also Judulang* v. *Holder*, 132 S. Ct. 476, 480 (2011). The BIA continued to grant relief *nunc pro tunc* under the 1952 Immigration and Nationality Act, finding "nothing to indicate that Congress wished to cut off this unique relief." *Matter of S-*, 6 I. & N. Dec. 392, 396 (BIA 1954); *see also Matter of Silva*, 16 I. & N. Dec. 26, 27 (BIA 1976).

The example of equitable *nunc pro tunc* relief refutes Amicus's contention (Br. 15) that, because Congress did not expressly mention the equitable doctrine of tolling, it must necessarily have foreclosed it. No statutory provision called for *nunc pro tunc* relief in 1940 either, yet Attorney General Jackson saw no difficulty in applying it in order to avoid a "capricious and whimsical" result. *Matter of L-*, 1 I. & N. Dec. at 5; *see also Edwards* v. *INS*, 393 F.3d 299, 308 (2d. Cir. 2004) ("The equitable remedy of *nunc pro tunc* relief has a long and distinguished history in the field of immigration law."); *Matter of Garcia-Linares*, 21 I. & N. Dec. 254, 257 (BIA 1996) (same); *Matter of S-N-*, 6 I. & N. Dec. 73, 74 (BIA 1954) (same).

There is thus no basis to categorically exclude the 90-day limitations period from the presumption of equi-

table tolling simply because an agency is involved. Not only has the Court generally approved the application of equitable principles in the administrative context, but the BIA has a long history of exercising equitable powers, a practice with which Congress is familiar. For that reason, the *Irwin* presumption applies with full force to the 90-day statutory period at issue here.

Of course, not *all* statutory deadlines governing agency proceedings are appropriately presumed to be subject to equitable tolling. *See, e.g., Auburn Reg'l*, 133 S. Ct. at 827. However, as Petitioner explained (Pet. Br. 20-21 n.8), the factors that the Court considered in *Auburn Regional* do not compel the same result with respect to the very different limitations period at issue here. Neither the government nor Amicus has developed any argument to the contrary.[4]

c. *The presumption of equitable tolling is not rebutted*

Amicus does not meaningfully contend that anything in the statute affirmatively rebuts the presumption of equitable tolling. Nor could such an argument hold up; when tolling is presumed, congressional silence on the issue is interpreted as intent to include tolling. *See Irwin*, 498 U.S. at 95-96. Certainly nothing in the statute suggests that equitable tolling was "eschewed by Congress." *Honda*, 386 U.S. at 501.

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[4] Cases holding that a *court* should not overturn an agency's proceeding "on the basis of the procedural devices employed," *Vermont Yankee Nuclear Power Corp.* v. *NRDC, Inc.*, 435 U.S. 519, 548 (1978), say nothing about whether *Congress* has presumptively included the equitable concept of tolling in a statutory limitations period applicable to a right that serves "an 'important safeguard' intended 'to ensure a proper and lawful disposition' of immigration proceedings," *Kucana*, 558 U.S. at 242.

Contrary to Amicus's argument (Br. 15-16), the fact that IIRIRA contains exceptions to the 90-day deadline supports the conclusion that it can be tolled. *See American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 541-542, 553 (1974) (where Clayton Act expressly suspended limitations period during certain proceedings initiated by the federal government, the "same concept leads to the conclusion that" the period was subject to tolling during other proceedings); *Avila-Santoyo* v. *U.S. Att'y Gen.*, 713 F.3d 1357, 1362 (11th Cir. 2013) (en banc) (exceptions to the 90-day reopening deadline are "indicative of a certain degree of flexibility that is inherently inconsistent with the 'jurisdictional label'"). And the IIRIRA exceptions allow later filings even in circumstances where equitable tolling would *not* be available, for instance where the noncitizen failed to pursue his or her rights diligently. *E.g.*, 8 U.S.C. § 1229a(c)(4)(C)(ii) (allowing asylum applicant to move to reopen based on evidence of "changed country conditions" not available at the original hearing, without requirement of diligence in the interim); *id.* § 1229a(c)(6)(C)(iii)-(iv) (similar rules regarding persons held removable *in absentia* and abused family members). Such exceptions "*supplement*[] rather than displace[] principles of equitable tolling." *Young*, 535 U.S. at 53.

Congress's decision to leave in place the regulations permitting the Board to reopen proceedings after the 90-day deadline further supports the conclusion that Congress intended the deadline to be tollable. The situation is comparable to *Bowen* v. *City of New York*, which involved the 60-day period for seeking judicial review of Social Security Administration decisions. 476 U.S. 467, 480-481 (1986). The Court observed that "Congress has authorized the Secretary to toll the 60-day limit" in particular circumstances, and took that as

"expressing its clear intention to allow tolling in some cases." *Id.* at 480 & n.12. Here, as in *Bowen*, "[t]he fairness concerns underlying the regulations support [the] application of equitable tolling," even in a case not expressly covered by the written tolling provisions, and "traditional equitable tolling" is "nowhere eschewed by Congress" and is "fully consistent with the overall congressional purpose." *Id.* at 480 (internal quotation marks omitted).

Indeed, allowing the 90-day deadline to be tolled not only is consistent with the statute's purpose, but actually advances it. The 90-day period is designed to encourage immigrants to pursue their rights diligently. Equitable tolling only applies when an unusual circumstance "deprives the filer, through no fault of his own, of the full period accorded by the statute." *McQuiggin* v. *Perkins*, 133 S. Ct. 1924, 1941 (2013) (Scalia, J., dissenting). In such circumstances, tolling fulfills the limitations period's purpose, because it was not a lack of diligence that caused the deadline to be missed. *See CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014) ("Equitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to 'pursue his rights diligently,' and when an 'extraordinary circumstance prevents him from bringing a timely action,' the restriction imposed by the statute of limitations does not further the statute's purpose." (brackets omitted)); *Bowen*, 476 U.S. at 481 (tolling "does not undermine the purpose of the ... limitations period," but rather "serves the purpose of the Act").[5]

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[5] Amicus cites floor statements addressing Members' desire to streamline the removal process. Br. 16-17 n.3. Petitioner does not dispute that goal, which was accomplished in several ways,

That the deadline for filing motions to reopen is short further cuts in favor of equitable tolling. In *United States* v. *Beggerly*, the Court cited "the unusually generous nature of the [Quiet Title Act's] limitations time period," which was 12 years, in deciding that the presumption of equitable tolling was defeated. 524 U.S. 38, 49-50 (1998). Conversely, in *Holland*, the Court found a one-year limitations period subject to tolling, explaining that "in contrast to the 12-year limitations period at issue in *Beggerly*, [the one-year] period is not particularly long." 560 U.S. at 647. The 90-day period for motions to reopen is likewise not long, which strengthens the presumption that it is subject to tolling in appropriate cases.

Finally, the application of tolling makes sense in light of the interests at stake. Rigid adherence to the 90-day deadline would deny immigrants any effective review of their claims, through no fault of their own. This Court "ha[s] long recognized that deportation is a particularly severe 'penalty,'" *Padilla* v. *Kentucky*, 559 U.S. 356, 365 (2010), and motions to reopen removal proceedings provide the only mechanism for agency and judicial review of new evidence, a factor that sets this motion apart from many others made in civil litigation. The 90-day deadline thus represents exactly the type of statutory limitation period to which equitable

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including by reducing the time to file and number of available motions to reopen. But that in no way suggests that Congress meant to foreclose the application of equitable tolling where exceptional circumstances deprived the noncitizen of the ability to exercise his statutory right within the prescribed period. *See Holland*, 560 U.S. at 648-649 (while a primary purpose of the statute may be to eliminate delays in the review process, it would not be reasonable to interpret it as "seek[ing] to end every possible delay at all costs").

tolling should and does apply in appropriate circumstances.

2. Even if the statute did not require equitable tolling, the BIA's decision to apply it was proper

As the government argues (Resp. Br. 14, 37), regardless of whether the *Irwin* presumption applies here, the BIA's decision that the 90-day deadline is subject to equitable tolling was proper. Amicus opposes the BIA's recognition of equitable tolling on two grounds, neither of which is persuasive.

a. Amicus's claim that the statute unambiguously *prohibits* tolling (Br. 25) is unsupported, as the statute says nothing about whether tolling should or should not apply. At most, Amicus has identified statutory silence, which does not support affirmance here. If the result of silence is not that equitable tolling presumptively *applies*—as it should be, *see supra* pp. 5-16—then at the very least it constitutes a gap that the BIA may fill. *See, e.g.*, *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1604 (2014) ("we read Congress' silence as a delegation of authority to [the agency] to select from among reasonable options").

Amicus essentially concedes (Br. 35) that the statute does not prohibit tolling by recognizing that the BIA may apply "principles of equitable tolling" through its regulatory authority to reopen proceedings *sua sponte*. If Amicus were correct that the statute's 90-day deadline were so strict that "there is no room for deference" (*id.* 25), then it would be hard to see how a *regulation* could give the BIA the authority to apply "principles of equitable tolling" that the statute supposedly foreclosed.

b. Amicus next contends (Br. 27) that, even if the BIA has administrative leeway to decide that the 90-day period can be tolled, it has in fact "not done so." But the BIA did just that in this case. Pet. App. 7 ("[T]he time for filing a motion to reopen may be tolled in cases of ineffectiveness of counsel."); *see also* Resp. Br. 2. It has done likewise in many other cases. Resp. Br. 24-27. The government accordingly attests (*id.* 37) that the agency "has permissibly incorporated [equitable] tolling into its procedures implementing the INA's administrative removal process."

Amicus takes issue with the fact that the BIA has so far advanced its equitable tolling position only through unpublished decisions. Br. 27-28. This Court, however, has not excluded consideration of unpublished decisions, because they often "reveal the interpretation put upon the statute by the agency." *Hanover Bank* v. *Commissioner*, 369 U.S. 672, 686 (1962); *see also Boesche* v. *Udall*, 373 U.S. 472, 482-483 (1963) (citing string of unpublished decisions for the proposition that "[f]rom the beginnings of the Mineral Leasing Act the Secretary has conceived that he had the power drawn in question").

Nor is it correct that the Board has "merely" followed binding circuit precedent in applying equitable tolling. Amicus Br. 28. The BIA has frequently found equitable tolling principles applicable where the relevant circuit had no published ruling requiring it, including in this case. Pet. App. 7. Some decisions relied on a now-vacated published decision of the Attorney General that recognized equitable tolling.[6] *See,*

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[6] In *Matter of Compean*, 24 I. & N. Dec. 710, 732 (A.G. 2009), the Attorney General ruled that "in cases where the alien moves to reopen beyond the applicable time limit—typically 90 days from

e.g., *Matter of Diaz*, 2009 WL 2981747 (BIA Aug. 21, 2009) (granting reopening). Other BIA decisions arising in circuits with no controlling law relied either on decisions from other circuits or decisions outside the immigration context. In both instances, the decisions relied upon were persuasive, not binding. For example, in a case from the Fifth Circuit, after noting the absence of binding precedent on point, the BIA assessed the movant's equitable tolling claim based on (persuasive) Second Circuit precedent. *Chavez-Guzman*, 2012 WL 6968959, at *1;[7] *see also*, *e.g.*, *Matter of Torres-Obregon*, 2015 WL 1208089, at *1 (BIA Jan. 29, 2015) (considering equitable tolling request based on decision outside the controlling circuit); *Matter of Cordova-Soto*, 2012 Immig. Rptr. LEXIS 5911 (BIA Sept. 17, 2012) (same); *Matter of* ——, 2008 Immig. Rptr. LEXIS 12133 (BIA May 20, 2008) (finding equitable tolling available before controlling circuit had made that determination, relying on tolling decisions in habeas context).

Accordingly, even if the statute were ambiguous, the BIA's decision to treat the 90-day period as subject to equitable tolling was proper.

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the date the removal order was entered—the Board may exercise its discretion to allow tolling of the 90-day period." That decision was later vacated, *Matter of Compean*, 25 I. & N. Dec. 1, 2 (A.G. 2009), and a new rule addressing motions to reopen based on ineffective assistance of counsel is slated for publication in November (Resp. Br. 25 n.9).

[7] After denying tolling under the statute, the BIA *separately* evaluated whether the motion to reopen could be granted under its *sua sponte* authority. *Chavez-Guzman*, 2012 WL 6968959, at *2.

3. Appellate jurisdiction lies even under Amicus's view that the BIA's application of tolling arises under its *sua sponte* authority

Amicus ultimately concedes that the BIA *may* apply "principles of equitable tolling," but contends that its authority to do so stems not from the statute, but from the regulation allowing reopening *sua sponte*. Br. 35; *see* 8 C.F.R. § 1003.2(a). Even if that conclusion were correct (though it is not), it would still not defeat the court of appeals' jurisdiction to review a denial of equitable tolling on grounds of ineffective assistance of counsel. Whether the source of equitable tolling is statutory or regulatory, the BIA applies a consistent standard that circuit courts have had no difficulty applying on review.

Amicus asserts that courts lack jurisdiction to review any denial of tolling if it is considered an exercise of discretionary authority. Br. 40; *see also* Resp. Br. 35 n.13. But even where Congress has specifically *removed* appellate jurisdiction over discretionary decisions, it was careful to preserve jurisdiction over questions of law. 8 U.S.C. § 1252(a)(2)(D) ("[n]othing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law"). Here, the BIA denied Mr. Mata's request for tolling because it (erroneously) concluded that he was convicted of a crime involving moral turpitude (AR66)—a pure question of law that courts retain jurisdiction to review. *E.g.*, *Hyder* v. *Keisler*, 506 F.3d 388, 390 (5th Cir. 2007) (where BIA denied discretionary relief, "[w]e have jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D) to review the question of law at issue in

this case: whether the BIA properly classified the crime ... as a CIMT"); *see also Pllumi* v. *Holder*, 642 F.3d 155, 160 (3d Cir. 2011) (recognizing jurisdiction to correct an error of law underlying a refusal to reopen proceedings *sua sponte*). Thus, even if tolling were a discretionary action for which Congress had stripped jurisdiction—though it is not—the statute preserves jurisdiction to correct the BIA's legal error here.[8]

Amicus (like the government) asserts, without elaboration, that "no meaningful standards currently permit courts to review the Board's exercise of its *sua sponte* authority." Amicus Br. 38; Resp. Br. 35 n.13. But neither Amicus nor the government explains why applications of long-established *equitable tolling* principles in cases involving *ineffective assistance of counsel*—even if captioned as "*sua sponte*" reopening decisions—involve "no meaningful standards." This Court has often recognized the standard for equitable tolling, *e.g. Pace* v. *DiGuglielmo*, 544 U.S. 408, 418 (2005), and the BIA's *Matter of Lozada* decision provides clear requirements for ineffective assistance claims, 19 I. & N. Dec. 637, 638-639 (1988). These standards are easily reviewable, and frequently reviewed, by courts of appeals. *See* Pet. Br. 21-22 (citing cases). And the BIA has applied the same judicially manageable standards in ineffective assistance cases in the Fifth Circuit, where such cases are considered as arising under the BIA's regulatory *sua sponte* reopening authority. *E.g.*,

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[8] The Fifth Circuit joined other circuits in rejecting the main BIA precedent on which the IJ and BIA relied for the erroneous conclusion that Mr. Mata was convicted of a crime involving moral turpitude. *See* Pet. Br. 7-8 & n.3. Indeed, the Attorney General recently vacated that precedent in its entirety. *Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 550 (A.G. Apr. 10, 2015) (vacating *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008)).

Matter of Hernandez-Rodriguez, 2012 WL 5473671, at *1 (BIA Oct. 25, 2012) (exercising "*sua sponte* authority" to grant untimely motion to reopen because noncitizen complied with *Lozada*'s "requirements for an ineffective assistance of counsel claim" and "suffered prejudice as a result of her former attorney's handling of her case"); *Matter of Benitez*, 2009 WL 3818024, at *1 (BIA Oct. 30, 2009) (denying tolling due to lack of diligence and noncompliance with *Lozada* factors); *see also* Pet. App. 7-8 (BIA decision deciding Mr. Mata's motion to reopen under *Lozada*).

If the BIA's standards are judicially manageable when exercised under the statute—which they clearly are, *see* Pet. Br. 21-22 (citing cases)—it makes no sense to treat the *same* standards as unmanageable when applied under the *sua sponte* regulation. Rather, this would be a situation in which the agency has "announce[d] and follow[ed] ... by settled course of adjudication ... a general policy by which its exercise of discretion will be governed," such that "an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned" by a court. *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996).

There is no reason to think that *Yang* creates "an undesirable incentive for agencies not to explain their exercise of discretionary authority." Amicus Br. 41-42. Instead, *Yang* provides the right incentive because agencies may always change their positions through a rational "avowed alteration" of policy. Where, as here, the agency has developed a settled practice for handling a particular category of claims—requests for eq-

uitable tolling due to ineffective assistance of counsel—its decisions are reviewable based on those principles.[9]

* * *

Congress has provided for judicial review of denials of motions to reopen, including motions that include a request for equitable tolling of the 90-day deadline based on ineffective assistance of counsel. 8 U.S.C. § 1252(a)(1), (b)(6). The Court may answer the question presented with that straightforward jurisdictional ruling. Should the Court choose to go further, it should hold that the 90-day deadline is subject to equitable tolling as a matter of statutory interpretation. In any event, the Court should declare that the Fifth Circuit has jurisdiction to review the BIA's decision and remand Mr. Mata's case for review on the merits.

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[9] Contrary to Amicus's contention (Br. 40 n.10), Petitioner did not suggest otherwise at the petition stage. Petitioner merely noted that he did not take issue with the proposition that, where there is "no meaningful standard" at play, then a *sua sponte* decision is unreviewable. Pet. 6. The BIA's application of settled equitable tolling and ineffective assistance principles does not fall into that category.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

MARK C. FLEMING
SYDENHAM B. ALEXANDER, III
NICOLE FONTAINE DOOLEY
JEFFERY A. HABENICHT
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109

JASON D. HIRSCH
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

CLAIRE M. BERGERON
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006

RAED GONZALEZ
Counsel of Record
NAIMEH SALEM
SHERIDAN GREEN
BRUCE GODZINA
GONZALEZ OLIVIERI LLC
2200 Southwest Fwy.
Suite 550
Houston, TX 77098
(713) 481-3040
rgonzalez@gonzalezolivierillc.com

BRIAN K. BATES
REINA & BATES
123 Northpoint Drive
Suite 190
Houston, TX 77060

ALEXANDRE I. AFANASSIEV
QUAN LAW GROUP
544 Westheimer Street
Suite 1750
Houston, TX 77056

APRIL 2015

IN THE

Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL, AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

BETH WERLIN
AMERICAN IMMIGRATION COUNCIL
1331 G Street, NW, Suite 200
Washington, DC 20005
(202) 507-7500

TRINA REALMUTO
NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD
14 Beacon Street, Suite 602
Boston, Massachusetts 02108
(617) 227-9727

IRA J. KURZBAN
Counsel of Record
EDWARD F. RAMOS
KURZBAN, KURZBAN, WEINGER,
TETZELI & PRATT, P.A.
2650 S.W. 27th Avenue,
Second Floor
Miami, Florida 33133
(305) 444-0060
ira@kkwtlaw.com

Counsel for Amici Curiae

258217

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTERESTS OF *AMICI CURIAE*

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council previously has appeared as *amicus* before federal courts to argue that the motion to reopen filing deadlines are non-jurisdictional and subject to equitable tolling and to address other issues relating to individuals' ability to reopen their removal cases.

The American Immigration Lawyers Association ("AILA") is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *Amici*, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals ("BIA"), as well as before the United States District Courts, Courts of Appeals, and the Supreme Court of the United States.

The National Immigration Project of the National Lawyers Guild ("National Immigration Project") is a national non-profit organization that provides legal and technical support to attorneys, legal workers, immigrant communities, and all advocates seeking to advance the rights of noncitizens. Through litigation, advocacy, publications and continuing legal education efforts, the National Immigration Project has been promoting these objectives for more than forty years. Members of the organization rely on the availability of motions to reopen and, accordingly, the National Immigration Project frequently appears as *amicus* before the federal courts in related litigation, provides assistance to attorneys, and provides trainings on these motions. Through this work, the National Immigration Project is acutely aware of the need for equitable tolling of the statutory deadline for filing motions to reopen and has a strong interest in ensuring that the statute is correctly interpreted to give noncitizens the full benefit of this important statutory right.

SUMMARY OF ARGUMENT

Amici respectfully submit this brief to assist the Court in assessing two aspects of the equitable tolling doctrine as it applies to motions to reopen

immigration proceedings. First, *Amici* illustrate why filing a motion to reopen based on an ineffective assistance of counsel claim can take a considerable length of time past the 90-day statutory filing deadline for motions to reopen. The Board of Immigration Appeals in *Matter of Lozada,* 19 I. & N. Dec. 637 (BIA 1988), established strict procedural requirements for ineffective assistance of counsel motions. Compliance with these requirements includes communication with prior counsel – which is often fraught with difficulties including the filing of a complaint with a bar disciplinary authority in most cases – as well as time-consuming efforts to obtain and analyze a complete record of the immigrant's case. As a result, it is at times impossible to file a motion to reopen based on ineffective assistance of counsel until months or longer after the 90-day deadline passes.

Second, *Amici* submit for the Court's consideration a sample of case examples describing immigrants who had the misfortune of receiving ineffective assistance of counsel or were otherwise prevented from immediately pursuing their cases, then had their motions to reopen denied by the agency for untimeliness. These individuals were ultimately saved by federal Courts of Appeals which recognized the applicability of equitable tolling to their circumstances. Had these immigrants been subject to the Fifth Circuit's restrictive and mistaken understanding of jurisdiction to review equitable tolling decisions, they never would have had their days in court, depriving them of opportunities to thrive and contribute as lawful residents or citizens of the United States.

ARGUMENT

I. Compliance with the Board of Immigration Appeals' procedural requirements for establishing an ineffective assistance of counsel claim can be onerous and lengthy, resulting in delayed filing of motions to reopen despite – and, indeed, because of – due diligence.

Ineffective assistance of counsel (IAC) often cannot be addressed quickly and efficiently within or shortly after the 90-day motion to reopen period in 8 U.S.C. § 1229a(c)(7)(C)(i), because numerous factual and legal barriers confront immigrants like Mr. Mata who seek to present IAC claims.

Immigrants are often unaware of their attorney's ineffective assistance until months or years after it occurred. This Court has recognized that "[i]mmigration law can be complex, and is a legal specialty of its own." *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); *see INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 195 (1991) (describing "complex regime of immigration law"); *Ardestani v. INS*, 502 U.S. 129, 138 (1991) (discussing "the complexity of immigration procedures and the enormity of the interests at stake").[2] In this context, identifying IAC is often a

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[2] *See also Castro O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. . . . A lawyer is often the only person who could thread the labyrinth."); *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) ("We have had occasion to note the striking resemblance between some of the laws we are called upon to

similarly complicated endeavor. Noncitizens' inability to represent themselves effectively in the "labyrinth that only a lawyer could navigate," *Avagyan v. Holder*, 646 F.3d 672, 679 (9th Cir. 2011), and the difficulty of obtaining a complete record of proceedings to review with competent counsel, mean that putting forward an IAC claim will sometimes take far longer than the 90 days permitted for a motion to reopen.

To perfect an IAC claim in a motion to reopen, a respondent in immigration proceedings must address the criteria set out in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). This Board of Immigration Appeals (BIA) decision requires the movant to: (1) submit an affidavit setting forth the terms of agreement with counsel alleged to be ineffective, along with that counsel's representations to the immigrant; (2) inform counsel about the alleged ineffective assistance and give counsel an opportunity to respond; and (3) reflect in the motion whether a bar complaint has been filed and, if not, why not.

A number of circuits, including the Fifth Circuit, require strict adherence to the requirements of *Lozada*. Failure to comply with all the *Lozada* requirements is sufficient to deny the immigrant's motion. *See, e.g.*, *Hernandez-Ortiz v. Holder*, 741 F.3d 644, 648 (5th Cir. 2014) (denying petition for review where *pro se* respondent filed a bar complaint against prior incompetent counsel but did not give that counsel an opportunity to respond before

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interpret and King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges.").

making IAC claim); *Rodriguez-Manzano v. Holder*, 666 F.3d 948, 953 (5th Cir. 2012) (respondent required to give lawyer an opportunity to respond despite lawyer having left the country).

These legal and practical obstacles are even more difficult when a noncitizen moves to reopen based on IAC without representation. *Cf.* U.S. Department of Justice, Executive Office for Immigration Review, *FY 2013 Statistics Yearbook* F1 (Apr. 2014) (in fiscal year 2013, 41% of immigration respondents were unrepresented). *Lozada*'s procedural requirements apply even to unsophisticated *pro se* respondents who have left their original, ineffective attorneys but have not been able to retain new counsel. Merely discovering that ineffective assistance occurred and that the BIA has established procedures for pursuing relief is a tremendous – sometimes insurmountable – challenge for *pro se* respondents, especially those in immigration detention facilities.

In addition to these procedural hurdles, a movant must demonstrate that competent counsel would have acted otherwise and that the inadequacy of counsel's performance prejudiced the proceedings' outcome. *Lozada*, 19 I. & N. Dec. at 640. In requiring this showing of prejudice, the BIA has rejected an "inherent prejudice" standard. *See Matter of Assaad*, 23 I. & N. Dec. 553, 561-62 (BIA 2003), *appeal dismissed for lack of jurisdiction sub nom. Assaad v. Ashcroft*, 378 F.3d 471 (5th Cir. 2004).

The first step in discovering whether an individual received ineffective assistance is typically Freedom of Information Act (FOIA), 5 U.S.C. § 552, requests to obtain all prior written and audio files

concerning the immigrant's case, requests that often must be filed with more than one of the various immigration agencies. Incompetent or predatory prior counsel frequently will not or cannot provide the appropriate information. Simply getting the results of FOIA requests for the immigration files, which are critical to determining whether prior counsel was ineffective, may take many months.[3]

After receiving the files, new counsel must review the court records, including all hearing transcripts, to determine whether prior counsel was ineffective such that an IAC motion can ethically be filed. She must then consult with her client and often perform additional research and investigation that were not done previously. Counsel then must prepare a detailed affidavit informing prior counsel of the alleged ineffectiveness, provide an opportunity to respond, and usually file a complaint with the appropriate bar disciplinary authority.

Given the challenges of discovering ineffective assistance and in light of the strict *Lozada* requirements, it is unsurprising that an immigrant's efforts to file a motion to reopen for IAC, even with the greatest diligence, may take months or even longer. *See, e.g.*, *Gordillo v. Holder*, 640 F.3d 700, 704-06 (6th Cir. 2011) (discussed *infra*) (filing deadline was equitably tolled and court concluded

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[3] *See generally* Department of Homeland Security Privacy Office, *2014 Annual Report to Congress* 35 (Sept. 30, 2014) ("In FY 2013 . . . the backlog increased from 28,553 to 51,761 due in part to the record-setting number of requests received. Components that process requests seeking immigration-related records (e.g., copies of the alien file, entry/exit records, detention, and deportation records) have the largest backlogs in the Department, . . . comprising 95 percent of the total DHS backlog.").

that due diligence existed, or could be found by the agency on remand, despite five-year delay in seeking reopening; immigrant asked three lawyers and a "*notario*" and was never told he qualified for relief); *Mezo v. Holder*, 615 F.3d 616, 621-22 (6th Cir. 2010) (where lawyer misled client about timely filing BIA appeal, ten-month delay before motion to reopen was filed did not show lack of due diligence); *Ghahremani v. Gonzales*, 498 F.3d 993, 999-1001 (9th Cir. 2007) (equitable tolling applied where respondent exercised due diligence over two-and-a-half years in hiring several lawyers).

In sum, determining whether there is a viable IAC claim and complying with the agency's requirements for establishing the claim take significant time. Competent counsel or the *pro se* immigrant must obtain files from often-hostile prior counsel, as well as the Executive Office for Immigration Review's court record and the immigrant's "Alien File" through a backlogged FOIA process. Only then may new counsel or the immigrant himself or herself comprehensively reassess the case and, usually, engage state bar disciplinary authorities. These time-consuming steps do not allow for shortcuts; if they are executed improperly, the immigrant risks rejection of the IAC claim before its merits are ever considered.

II. Federal court review of adverse agency decisions on equitable tolling is indispensable to ensure that immigrants are not deprived of their day in court by ineffective assistance of counsel or other extraordinary factors beyond their control.

Amici represent and support thousands of immigration lawyers who are committed to zealous and forthright representation of their clients, whose family lives, employment opportunities, and even personal safety depend on the outcome of immigration proceedings. Unfortunately there is a parallel cohort of incompetent or malevolent immigration practitioners, some of whom defraud their clients and/or engage in the unauthorized practice of law. *See, e.g.*, U.S. Citizenship and Immigration Services ("USCIS"), *The Wrong Help Can Hurt: Beware of Immigration Scams* (May 2011).

The following accounts[4] of immigrants who were harmed by ineffective assistance of counsel or other extraordinary circumstances beyond their control, and subsequently denied equitable tolling by the BIA to reopen their cases, illustrate how crucial federal court review is. These individuals' hopes for a life in the United States with their families often depend on Article III review to ensure their day in court. Had the Fifth Circuit's approach eschewing review of the agency's equitable tolling

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[4] These accounts are drawn from federal court and agency decisions as well as correspondence between *Amici* and counsel or former counsel for the immigrants involved. All documentation is on file with counsel for *Amici* and available at the Court's request.

determinations applied, none of these people would have prevailed.

a. *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005)

In addition to motions to reopen governed by the 90-day filing deadline, equitable tolling matters for motions to reopen proceedings in which removal orders were entered *in absentia*. Reopening is justified where "the alien demonstrates that the failure to appear was because of exceptional circumstances." *See* 8 U.S.C. § 1229a(b)(5)(C)(i) (setting 180-day deadline). The requisite "exceptional circumstances" may include inaccurate advice from counsel concerning the need to appear at a scheduled hearing. *See Matter of Grijalva-Barrera*, 21 I. & N. Dec. 472, 474 (BIA 1996).

Jose Borges had a straightforward case, as far as immigration matters go. Recently married to a U.S. citizen, Mr. Borges had a clear path to pursue lawful permanent resident (LPR) status when he was scheduled for a hearing before an immigration judge (IJ) in February 1998. For competent immigration counsel, his case should have been routine.

Mr. Borges, however, retained an "immigration services company" called Entra America. At Entra, he met with a supposed "paralegal," who explained that an attorney at the firm would represent him. According to her, the attorney would help Mr. Borges apply for adjustment of status, which is the process for obtaining LPR status from within the United States.

When Mr. Borges inquired about his hearing, the paralegal told him – allegedly at the attorney's

direction – that he need not (and should not) appear for his hearing because an adjustment of status application had been filed on his behalf. Mr. Borges followed his attorney's ostensible instructions. Yet when he failed to appear for his hearing, he was ordered removed *in absentia*.

Mr. Borges' attorney did eventually submit a visa petition and adjustment of status application. By that point, with a removal order outstanding, Mr. Borges was no longer eligible to adjust. The adjustment application prepared and filed by his attorney failed to disclose the removal order. Apparently unaware of the order, the former Immigration and Naturalization Service (INS) granted Mr. Borges employment authorization and scheduled an interview, leading Mr. Borges to believe that the *in absentia* order was no longer operative.

Mr. Borges' mistaken belief was reinforced when in April 1998 he went to the Entra office with an INS letter requesting that he report for deportation. The "paralegal" wrongly stated that the adjustment application had "taken care of" the *in absentia* order, adding that the attorney would have the order officially vacated by filing a motion to reopen. *Borges*, 402 F.3d at 402.

Counsel did file a motion to reopen in late April, but it provided no explanation for Mr. Borges' failure to appear at his hearing. The IJ denied the motion, but the decision was served only on the attorney, who failed to inform Mr. Borges.

When it came time for Mr. Borges and his wife to attend their INS interview, Entra sent a different attorney to accompany them. This attorney advised Mr. Borges not to mention his removal order during the interview. The INS granted Mr. Borges'

adjustment application, and he believed his case was resolved.

Two months later, Mr. Borges – still awaiting the arrival of his "green card" – contacted Entra to confirm that he could travel to Venezuela to visit his sick mother. Only then did he learn from the second Entra attorney that he still had an outstanding removal order.

Mr. Borges, with the second attorney, informed the INS officer who conducted the interview about the removal order. At the same time, the attorney told Mr. Borges that he would file another motion to reopen. He never did. Instead, he asked the government to join in a motion to reopen. Mr. Borges contacted the second attorney regularly over the next two years and was repeatedly told falsely that a new motion to reopen was before the IJ.

Despite these assurances, Mr. Borges eventually sought new representation and learned that there was no pending motion. His new attorney filed a second motion to reopen the *in absentia* order in January 2003, within 180 days of when Mr. Borges learned the truth about what representation he had received from his previous attorneys. The IJ denied the motion as untimely and non-compliant with *Lozada*, and the BIA affirmed (noting that an affidavit submitted by the original attorney denying wrongdoing had "the ring of truth"). *In re Jose A. Borges*, A73-591-940, 2004 WL 848509, *2 (BIA Mar. 1, 2004).

Shortly before the BIA issued its decision, Mr. Borges was arrested by Immigration and Customs Enforcement (ICE). He was detained for more than a year, primarily at the Queens Detention Facility in

Jamaica, New York. Mr. Borges had never been incarcerated and experienced a serious deterioration in mental health. He twice attempted suicide and was confined to a secure psychiatric institution for a period of three months for treatment of depression and anxiety attacks.

Mr. Borges' new attorney continued to seek reopening. In the course of pursuing disciplinary proceedings against prior counsel, Mr. Borges' attorney discovered that the lawyer had submitted altered records regarding Mr. Borges' representation to the New York Bar Disciplinary Committee, in order to make it seem like he, rather than the Entra "paralegal," worked on the case.

At the Third Circuit, the court vacated the BIA's ruling and remanded, holding that the filing deadline is subject to equitable tolling in cases of fraud. Shortly after the court's opinion, Mr. Borges was released from detention. The BIA applied equitable tolling and reopened the case. On remand, the IJ vacated the removal order and allowed Mr. Borges to pursue adjustment of status with USCIS.

Mr. Borges also filed a malpractice claim against the attorneys and consultant who originally represented him. In 2012, a jury awarded him more than $1 million in damages for his lost wages and pain and suffering, as well as legal fees. *See Borges v. Placeres*, 986 N.Y.S.2d 298 (N.Y. App. Term 2014), *aff'd* 123 A.D.3d 611 (N.Y. App. Div. 2014).

Mr. Borges became an LPR in 2006. He attended classes at night, earning an MBA from Rutgers University in 2011, and now works as an engineering manager for medical devices. In 2012, he became a U.S. citizen.

b. *Aris v. Mukasey*, 517 F.3d 595 (2d Cir. 2008)

Garfield L. Aris, an immigrant from Jamaica, entered the United States as a lawful permanent resident in 1986 at the age of twelve. As recounted by the Second Circuit, "[t]he offense that triggered Aris' deportation proceedings was a relatively minor drug offense. Deporting Aris would separate him from his mother, daughter, step-daughter and wife and deliver him to a country where he has spent virtually no time since emigrating at the age of twelve and has no social or familial connections." 517 F.3d at 597 n.4 (internal citation and quotation marks omitted). His wife, children, and mother are all U.S. citizens.

After Mr. Aris was placed in deportation proceedings following his conviction, he hired a lawyer. At a hearing in April 1994, an IJ granted Mr. Aris permission to apply for discretionary relief from deportation under former 8 U.S.C. § 1182(c), (called "212(c) relief"). As Mr. Aris's lawyer conceded his deportability, the discretionary waiver was his only hope to avoid deportation and maintain his LPR status. The IJ ordered that Mr. Aris's relief application be filed by the close of business, and set a hearing for May 2, 1995.

Despite the IJ's instruction, counsel never filed a 212(c) application.[5] When Mr. Aris called his lawyer's office on the morning of May 2, 1995 to ask

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[5] The Second Circuit stated that Mr. Aris "would seem to have a compelling case for § 212(c) relief in light of the social and humane considerations of his case." *Id.* at 597 n.4. The court noted that counsel's failure to file a relief application "in and of itself likely constitutes ineffective assistance of counsel in light of the equities of Aris's case." *Id.* at 597.

where he should meet him for the hearing that day, a firm paralegal erroneously advised him "something to the effect that the firm calendar did not indicate any hearing scheduled for that day and that no attorneys were available to speak with him." 517 F.3d at 598. Mr. Aris relied on the paralegal's representation that no hearing was set for that day and did not appear.

After speaking with Mr. Aris, the firm paralegal phoned the immigration court and learned that, in fact, there *was* a hearing that day. The paralegal telephonically requested that the hearing be adjourned, but was told to call again later in the afternoon because the IJ was on the bench. By the time the paralegal contacted the court as instructed, it was too late: Mr. Aris had already been ordered deported *in absentia*.

Neither the paralegal nor Mr. Aris's attorney made any effort to contact him. In fact, the law firm took no steps *at all* to attempt to remedy their error until Mr. Aris came into the firm's offices with a "bag-and-baggage" letter stating that the immigration authorities were ready to deport him. The attorney told Mr. Aris that "he would take care of everything," *id.* at 598, but never admitted the paralegal's mistake or revealed the *in absentia* order.

Counsel then filed a motion to reopen with the IJ seeking to rescind the *in absentia* deportation order. An affidavit accompanying the motion mentioned the calendaring error to explain *counsel's* failure to appear for the hearing. But neither the affidavit nor the motion acknowledged that the paralegal's mistake was responsible for Mr. Aris's failure to appear. The IJ denied the motion, and the

BIA affirmed. No one from the law firm contacted Mr. Aris to let him know about these decisions.

Mr. Aris had no idea that he was ordered deported *in absentia* until immigration agents arrested him at his home on June 1, 2005. In fact, the previous year, Mr. Aris had gone to an immigration attorney to discuss how he could become a U.S. citizen. After his arrest, Mr. Aris spent nine months in detention, depriving his family of their principal breadwinner. His wife and stepdaughter (both U.S. citizens) were evicted from their apartment and forced to move into a homeless shelter.

Mr. Aris's family paid a substantial sum to new counsel who further botched his case, "fil[ing] a number of factually erroneous and legally flawed submissions on his behalf." *Id.* None of the submissions mentioned prior counsel's erroneous information regarding Mr. Aris's court hearing – the very "exceptional circumstance" which formed the basis for reopening. Indeed, the boilerplate papers nowhere even stated that Mr. Aris was seeking to reopen an *in absentia* deportation order.

By late 2005, Mr. Aris's family became concerned about new counsel's treatment of his case and began to seek legal advice elsewhere. A non-profit organization referred the case to Cleary Gottlieb Steen & Hamilton. Lawyers from the firm met with Mr. Aris in detention and agreed to represent him *pro bono*.

His new attorneys "promptly investigated the various errors committed by Aris's prior counsel." *Id.* These attorneys worked diligently over the course of six months to obtain the documentary evidence necessary to reconstruct and definitively establish

the ineffective assistance rendered by prior counsel. With this evidence in hand, the firm filed disciplinary complaints against both of Mr. Aris's prior attorneys.

After waiting for both prior counsel to respond to the complaints, Mr. Aris's attorneys filed a motion to reopen with the BIA, for the first time explaining that prior counsel's wrong advice accounted for Mr. Aris's failure to appear for his May 2, 1995 hearing. The motion asked the BIA for equitable tolling of the 180-day filing deadline due to prior counsel's ineffective assistance.

The BIA denied the motion, stating that it had "already addressed the circumstances of [Mr. Aris's] failure to appear" in a prior ruling. *Id.* at 599. Yet it was impossible for the BIA to have considered the previously unsubmitted evidence that Mr. Aris failed to appear for his hearing because of prior counsel's wrong advice.

Recognizing the BIA's mistake, the Second Circuit reversed. The court noted that "Mr. Aris's prior attorneys failed spectacularly to honor their professional obligation to him and to the legal system they were duty-bound to serve," and remanded the case. An IJ granted Mr. Aris section 212(c) relief on June 14, 2010.

c. *Ortega-Marroquin v. Holder*, 640 F.3d 814 (8th Cir. 2011)

Cancellation of removal for non-permanent residents is a currently available form of relief with certain prerequisites, including continuous physical presence in the United States for at least 10 years, good moral character, and a U.S. citizen or lawful

permanent resident spouse, parent, or child who would suffer exceptional and extremely unusual hardship as a result of the noncitizen's deportation. *See* 8 U.S.C. § 1229b(b). When Daniel Ortega appeared before an IJ in 2009, he was a strong candidate for cancellation. His two U.S. citizen children suffered from numerous medical conditions: lupus, a heart defect, a potentially cancerous eye tumor, recurrent bronchitis and asthma attacks, and severe clinical depression.

Although Mr. Ortega's attorney knew about these myriad conditions, he omitted mention of them in the cancellation application, and advised Mr. Ortega that "unless his children were on their death beds, medical evidence was not worth submitting." 640 F.3d at 816. This advice was egregiously flawed, because the children's serious medical conditions were critical to establishing that Mr. Ortega's removal would inflict exceptional and extremely unusual hardship on a qualifying relative. *See Matter of Monreal-Aguinaga*, 23 I. & N. Dec. 56, 63 (BIA 2001) (factors relevant to hardship analysis include "health [and] circumstances" of the qualifying relative); *cf. Mendez v. Holder*, 566 F.3d 316, 322-23 (2d Cir. 2009) (IJ's failure properly to consider evidence regarding medical conditions of U.S. citizen children was reversible error).

The IJ denied Mr. Ortega's cancellation application solely on account of his failure to establish hardship to a qualifying relative, and the BIA affirmed.

After the BIA's ruling, Mr. Ortega enlisted the services of a "*notario*," who prepared a *pro se* petition for review and filed it with the Eighth Circuit Court of Appeals. *See generally* American Bar Association

Commission on Immigration, *Fight Notario Fraud* (undated), *available at* http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud.html. While the petition argued ineffective assistance of prior counsel for failing to include evidence of the children's medical conditions, the "*notario*" neither filed a motion to reopen with the BIA nor complied with *Lozada*'s procedural requirements. The petition for review was unsuccessful.

In the meantime, Mr. Ortega secured a genuine attorney who filed a procedurally proper motion to reopen with the BIA based on ineffective assistance of counsel. The motion, which was filed just over five months after the BIA's decision, argued that it was timely based on equitable tolling.

After Mr. Ortega moved to reopen his case, ICE nevertheless deported him. Another petition for review ensued to challenge the government's successful argument to the BIA that Mr. Ortega's departure had ended his case. The Eighth Circuit disagreed and on remand the BIA concluded that equitable tolling should apply. The BIA returned Mr. Ortega's case to the IJ to reconsider his cancellation application in light of the evidence omitted by prior counsel.

ICE paroled Mr. Ortega back into the United States from Guatemala. *See* 8 U.S.C. § 1182(d)(5). The parole rendered Mr. Ortega eligible to adjust to LPR status through his U.S. citizen son, who had turned twenty-one. *See id.* § 1255(a) (authorizing adjustment for noncitizens "paroled into the United States"). The IJ terminated proceedings so Mr. Ortega could apply affirmatively for adjustment of status. In November 2014, the Department of

Homeland Security approved the adjustment application, and Mr. Ortega is now a lawful permanent resident.

d. *Mendez-Vargas v. Holder*, 436 F. App'x 733 (9th Cir. 2011)

Hector Mendez–Vargas and his wife Isabel have a U.S. citizen daughter, Mirian, born with Down's Syndrome. Their daughter's condition should have given Mr. Mendez a strong chance of avoiding deportation through cancellation of removal. To prevail, he needed to show that his removal to Mexico would cause Mirian exceptional and extremely unusual hardship. *See* 8 U.S.C. § 1229b(b)(1)(D). An IJ set a hearing on Mr. Mendez's cancellation application for May 2002.

Mr. Mendez's lawyer never told him that the purpose of the hearing was to decide his eligibility for cancellation, nor did he explain what such a hearing would entail. At no point prior to or during the hearing did counsel submit any evidence regarding the nature of medical and social services in Mexico for children with Down's Syndrome, the cost of such services, or the family's likely ability to afford them. Indeed, counsel called no witnesses besides Mr. Mendez and submitted no documentation relevant to Mirian's potential hardship.

During the hearing, Mr. Mendez managed to offer some general testimony regarding his daughter's condition and the availability of medical care in Mexico. But while the IJ accepted that Mirian's Down's Syndrome was "exceptional," the complete lack of documentary evidence to establish the nature and availability of treatment was deemed

fatal to establishing her *future* potential hardship. *See Figueroa v. Mukasey*, 543 F.3d 487, 497 (9th Cir. 2008) (the cancellation hardship inquiry is a "future-oriented analysis, not an analysis of [a qualifying relative's] present conditions"). The BIA affirmed the IJ's removal order.

After bungling the administrative proceedings, counsel charged Mr. Mendez an additional $5,200 to file a petition for review with the Ninth Circuit. *See Mendez-Vargas v. Gonzales*, 158 F. App'x 876 (9th Cir. 2005). The court admonished counsel for failing to respond to a government motion to dismiss, and ordered the parties to brief the question of whether the IJ should have raised the issue of ineffective assistance *sua sponte*.

Counsel was given a final opportunity to rectify the harm his ineffective assistance had inflicted on Mr. Mendez when the government's attorney offered to consider filing a joint motion to reopen with the BIA if Mr. Mendez's counsel could show what information he would submit to support cancellation. Counsel never told Mr. Mendez about this offer, nor did he bother to respond. The Ninth Circuit summarily dismissed the petition for review.

In the midst of making preparations to depart the country, Mr. Mendez conferred with a new attorney on February 10, 2006. After the government declined to join in a motion to reopen, replacement counsel filed a motion to reopen with the BIA requesting equitable tolling based on ineffective assistance. The BIA denied the motion, concluding that the prior attorney caused no prejudice. The Ninth Circuit reversed and remanded.

On remand, after reviewing the evidence and testimony provided by new counsel, the IJ stated an intention to grant Mr. Mendez cancellation of removal and is waiting to issue formal approval after the annual limit of cancellation grants resets. *See* 8 U.S.C. § 1229b(e)(1).

e. ***Gordillo v. Holder*, 640 F.3d 700 (6th Cir. 2011)**

When Josue Gordillo and Leslie Castellanos appeared before an IJ in the late 1990s, they qualified for special-rule suspension of deportation under the Nicaraguan Adjustment and Central American Relief Act (NACARA), a discretionary form of relief then available for certain noncitizens with good moral character whose deportation would result in extreme hardship to a U.S. citizen or LPR close family member.[6] Their lawyer, however, never told the couple that they were eligible for suspension, nor did he file an application for NACARA relief before the immigration court. The IJ ordered them deported in January 1999.

In December 2002, the BIA affirmed the deportations, but the lawyer never informed the couple that a final order was entered. They only learned about the order after receiving a notice that

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[6]Although Congress replaced suspension of deportation with cancellation of removal in 1996, it later acted to allow certain Central American immigrants like Mr. Gordillo and Ms. Castellanos to apply for suspension under the more generous pre-1996 criteria. *See* Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, § 203(a), 111 Stat. 2193, 2196-98 (1997).

their work permit extensions were denied, eighteen months after the BIA's decision.

Dismayed and concerned about their lawyer's failure to inform them of the BIA's decision, the couple consulted two other attorneys and a "*notario*" regarding their case. None told them of their eligibility for suspension, and so they did not believe there was anything else that they could do.

When ICE arrested Mr. Gordillo on August 7, 2008, the couple, in desperation, consulted with yet another lawyer who finally provided them with competent advice about their eligibility for suspension. This discovery did not prevent Mr. Gordillo's deportation from the United States to Guatemala.

In compliance with *Matter of Lozada*, the couple filed a grievance against the attorney who represented them before the IJ, and moved to reopen their case based on ineffective assistance. The BIA denied the motion and declined to apply equitable tolling because it concluded that the couple was not diligent in seeking competent counsel.

The Sixth Circuit reversed, rejecting the BIA's claim that the couple should have "divine[d]" their prior counsel's ineffectiveness from a footnote in the IJ's decision. Though the footnote on which the BIA relied "di[d] say that a complicated-sounding motion was 'not timely filed,'" the court held it unreasonable "to expect an alien to pluck those three words . . . from the thousands of words in the order, and then divine from them that her lawyer overlooked a winning argument on her behalf." 640 F.3d at 704.

The court decided instead that the "appropriate time" to charge the couple with knowledge of their initial lawyer's ineffectiveness

was when they learned that he failed to inform them of the BIA's denial of their appeal eighteen months prior. The couple was diligent from that point forward, according to the court, because they "first took prompt action to pursue their rights, and only later gave up after repeatedly being told they did not have any." *Id.* at 705. The court noted that "[t]he mere passage of time . . . does not necessarily mean [they were] not diligent." *Id.*

On remand, the BIA accepted that equitable tolling was warranted for the entire period relevant to the couple's motion to reopen, and sent the cases back to the IJ. Ms. Castellanos and Mr. Gordillo were both granted suspension of deportation, in 2013 and 2015 respectively. In 2014, Mr. Gordillo had returned from Guatemala after six years of separation from his family.

Both are now lawful permanent residents. Ms. Castellanos works in international business and volunteers to teach English to Spanish-speaking adults. Mr. Gordillo is completing a nursing program and plans to work in health care. They live with their two U.S. citizen sons, aged 10 and 15, one of whom is an accomplished gymnast while the other studies in a gifted program at his elementary school.

f. *Gaberov v. Mukasey*, 516 F.3d 590 (7th Cir. 2008)

Equitable tolling also applies to circumstances that do not involve ineffective assistance of counsel. Simeon Gaberov is a native of Bulgaria who arrived in the United States on a visitor's visa in June 1990. *See* 516 F.3d at 529. He affirmatively filed an asylum application in September of that year based on

persecution suffered at the hands of the Communist Party in Bulgaria. *Id.* The former INS placed him in removal proceedings. An IJ denied Mr. Gaberov asylum and he timely filed an appeal with the BIA. The BIA affirmed the IJ's denial. *Id.* However, neither Mr. Gaberov nor his new attorney received notice of the decision. The only mail Mr. Gaberov's attorney received from the BIA was a cover letter with a decision in another person's case. *Id. at* 593.

Upon receiving this misaddressed decision, Mr. Gaberov contacted the BIA and was told that his case was still pending. His attorney went to the local USCIS office, which informed Mr. Gaberov that he could not be deported because the decision did not refer to him. *Id.*

In December 2002, Mr. Gaberov married a U.S. citizen, who filed a visa petition on his behalf. In June 2005, the couple appeared for an interview with USCIS where Mr. Gaberov presented the notice his attorney had received from the BIA. The immigration officer told the couple that it appeared that the BIA entered a decision in Mr. Gaberov's case but it was not binding because Mr. Gaberov did not receive adequate notice. The officer proceeded to determine that Mr. Gaberov's marriage was bona fide and approved the visa petition. However, later that month Mr. Gaberov received a "bag-and-baggage" letter ordering him to appear packed and ready for deportation. *Id.*

In April 2006, after a stay of removal from the agency, Mr. Gaberov filed a motion to reopen with the BIA arguing that he never received proper notice of its decision. The BIA denied him relief because it determined that Mr. Gaberov *was* on notice of the BIA's decision and that he did not exercise due

diligence in checking the status of his appeal. *Id.* at 593-94.

The Seventh Circuit overturned the BIA's decision and held that Mr. Gaberov was entitled to equitable tolling. The court determined that it was not clear that Mr. Gaberov was on notice of the BIA's decision and that the steps he took to make the agency aware of its mistake constituted due diligence. *Id.* at 595-96.

Mr. Gaberov is now a lawful permanent resident living with his U.S. citizen wife and spending time with his LPR son and grandchildren.

While all six cases recounted in this brief have unique features, the common thread is that a federal appellate court corrected the BIA's misapplication of equitable tolling. Without federal jurisdiction to review the agency's treatment of a venerable legal principle, none of these immigrants would have had a full and fair day in court.

As evocative as these cases are of lives rescued by correct applications of equitable tolling, the untold cases of immigrants deported from within the Fifth Circuit for lack of judicial review also speak loudly. To ensure that all courts guard against erroneous denials of reopening based on ineffective assistance of counsel or other extraordinary circumstances beyond their control, this Court should end the Fifth Circuit's outlier status in this vital precinct of immigration law.

CONCLUSION

Amici respectfully urge the Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

IRA J. KURZBAN
Counsel of Record
EDWARD F. RAMOS
KURZBAN, KURZBAN, WEINGER,
TETZELI & PRATT, P.A.
2650 S.W. 27th Avenue
Second Floor
Miami, FL 33133
(305) 444-0060

BETH WERLIN
AMERICAN IMMIGRATION COUNCIL
1331 G Street, NW, Suite 200
Washington, DC 20005
(202) 507-7500

TRINA REALMUTO
NATIONAL IMMIGRATION PROJECT OF
THE NATIONAL LAWYERS GUILD
14 Beacon Street, Suite 602
Boston, MA 02108
(617) 227-9727

Attorneys for Amici Curiae

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BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW BY INVITATION OF THE COURT

WILLIAM R. PETERSON
Counsel of Record
CHARLES R. FLORES
BECK REDDEN LLP
1221 McKinney Street
Suite 4500
Houston, TX 77010
(713) 951-6236
wpeterson@beckredden.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Whether, when a petition for review of a motion to reopen challenges the Board of Immigration Appeals' denial of equitable tolling, a court of appeals errs in dismissing for want of jurisdiction. More specifically:

1. Is the 90-day statutory deadline for filing a motion to reopen subject to equitable tolling?

2. If not, does a court of appeals err in construing an argument for equitable tolling as pertaining to the Board's exercise of its *sua sponte* authority to reopen?

3. Does a court of appeals have jurisdiction to review the Board's failure to exercise its *sua sponte* authority to reopen?

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BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW BY INVITATION OF THE COURT

INTEREST OF *AMICUS CURIAE*

This brief is submitted by William R. Peterson, *amicus curiae* in support of the judgment below, by invitation of the Court. See 574 U.S. ___ (order of January 16, 2015).[1]

[1] *Amicus* affirms, under this Court's Rule 37.6, that no counsel for a party authored any part of this brief and that no person other than *amicus* and his co-counsel has made a monetary contribution to fund its preparation or submission.

INTRODUCTION

Two sources of authority permit the Board of Immigration Appeals (Board) to reopen removal proceedings. By statute, an alien has the right to file a single motion to reopen within 90 days of the date of entry of a final administrative order of removal. 8 U.S.C. 1229a(c)(7)(C)(i). By regulation, the Board has the discretion to reopen any case at any time on its own motion. 8 C.F.R. 1003.2(a).

The source of authority exercised by the Board determines the availability of judicial review. Courts generally have jurisdiction to review the Board's denial of a statutory motion to reopen. See *Kucana* v. *Holder*, 558 U.S. 233 (2010); Pet. Br. 14-16; U.S. Br. 16-28. *Amicus* and the government agree that courts lack jurisdiction to review the Board's refusal to exercise its regulatory discretion to reopen *sua sponte*. See *Heckler* v. *Chaney*, 470 U.S. 821 (1985); U.S. Br. 35 n.13. Jurisdiction over an alien's challenge to the denial of reopening thus depends on which authority it concerns.

Petitioner sought reopening after the 90-day deadline, arguing in his petition for review that the deadline should have been equitably tolled. In light of circuit precedent providing that the statutory deadline cannot be equitably tolled, the Fifth Circuit interpreted petitioner as arguing that the Board should have reopened *sua sponte* based on principles of equitable tolling. The Fifth Circuit dismissed the petition, in part, for want of jurisdiction.

Thus, although the ultimate question concerns whether the Fifth Circuit properly dismissed the petition for want of jurisdiction, the initial inquiry concerns whether the deadline is subject to equitable tolling, a question that has divided the lower courts and on which the parties have joined issue.

STATEMENT

A. Statutory and Regulatory Background

1. Proceedings under Section 1229a of Title 8 of the United States Code are "the sole and exclusive procedure for determining whether an alien may be admitted to the United States or * * * removed from the United States." 8 U.S.C. 1229a(a)(3).

Both the Department of Justice and Department of Homeland Security participate in these proceedings. Removal proceedings occur before immigration judges. 8 U.S.C. 1229a(b)(1). Aliens may appeal decisions of immigration judges to the Board, which reviews the factual findings for clear error and questions of law *de novo*. 8 C.F.R. 1003.1(d)(3); 8 C.F.R. 1003.3; 8 C.F.R. 1003.38. The Office of the Chief Immigration Judge and the Board are subdivisions of the Executive Office for Immigration Review within the Department of Justice. 8 C.F.R. 1003.0; 8 C.F.R. 1003.1; 8 C.F.R. 1003.10.

The immigration laws are enforced by lawyers from Immigration and Customs Enforcement, a

division of the Department of Homeland Security. See 8 U.S.C. 1103(a)(1); 8 C.F.R. 100.1.

An alien may be represented before the immigration judge and Board, but counsel will not be appointed. 8 U.S.C. 1229a(b)(4); 8 U.S.C. 1362; 8 C.F.R. 1003.16. Permissible representatives include attorneys, law students, accredited representatives, accredited officials, and subject to certain constraints, "reputable individual[s] of good moral character." 8 C.F.R. 1292.1(a).

Aliens subject to removal may apply for discretionary cancellation of removal and adjustment of status to lawful permanent resident. 8 U.S.C. 1229b(b)(1). Immigration judges act as the Attorney General's delegates in determining whether to grant this discretionary relief. 8 C.F.R. 1003.10(a). An alien seeking cancellation of removal must prove that the alien satisfies the eligibility requirements and merits a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4); 8 C.F.R. 1240.8(d). An alien who has been convicted of a crime involving moral turpitude is not eligible for cancellation of removal. 8 U.S.C. 1182(a)(2)(A)(i)(I); 8 U.S.C. 1227(a)(2)(A)(i)(I); 8 U.S.C. 1229b(b)(1).

Judicial review of a final order of removal is governed by Section 1252 of Title 8 of the United States Code. 8 U.S.C. 1252(b)(9). An alien may file a petition for review with the court of appeals "not later than 30 days after the date of the final order of removal." 8 U.S.C. 1252(b)(1). The court of appeals will decide the

case based on the administrative record. 8 U.S.C. 1252(b)(4).

2. Two sources of authority permit removal proceedings to be reopened. First, for more than fifty years, the Board's regulations have provided it with authority to reopen or reconsider cases on its own motion. See 27 Fed. Reg. 96 (Jan. 5, 1962) (now codified at 8 C.F.R. 1003.2).

Second, an alien may file a statutory motion to reopen. Congress first addressed reopening in the Immigration Act of 1990, Pub. L. No. 101-649, § 545(d), 104 Stat. 4978, 5063 (1990). In an effort "to expedite petitions for review and to redress the related problem of successive and frivolous administrative appeals and motions," Congress "directed the Attorney General to promulgate regulations limiting the number of reconsideration and reopening motions that an alien could file" and "regulations specifying the maximum time period for the filing of those motions." *Stone* v. *INS*, 514 U.S. 386, 400 (1995). Congress suggested a single motion filed within 20 days of the final determination. *Ibid.*

A proposed rule first issued in 1994. Consistent with the suggestions in the Conference Report, the proposed rule allowed for only one motion to reopen and required that the motion be filed within 20 days. 59 Fed. Reg. 29,386, 29,388 (proposed June 7, 1994).

In 1995, the proposed rule was revised in response to comments expressing concern that "unrepresented aliens and, in particular, detained aliens

would not have access to counsel in time to develop a meaningful motion to reopen within the 20-day period." 60 Fed. Reg. 24,573, 24,574 (proposed May 9, 1995). Based on these concerns, the agency agreed that a greater time period – 90 days – should be allowed for filing motions to reopen. *Ibid.* Nonetheless, even the revised rule would "dramatically limit this form of relief" by restricting aliens to a single motion to reopen and because "such opportunity for reopening will be limited to a 90-day time period." *Ibid.* These limits "reflect the congressional intent to streamline the deportation process, while providing a reasonable opportunity for meritorious cases to be heard." *Ibid.*

In issuing a final rule in April 1996, the Department of Justice adhered to the 90-day deadline and responded to comments that "requested that a 'good cause' exception to the time and number limitations be added to the new provisions concerning motions to reopen." 61 Fed. Reg. 18,900, 18,901-18,902 (April 29, 1996). The Department of Justice rejected the suggested "good cause" exception: "The Department does not agree with the commenters' suggestions that a 'good cause exception' would be an appropriate procedural mechanism for addressing exceptional cases that fall beyond this rule's time and number limitations." *Ibid.* Instead, the Board's authority to reopen *sua sponte* "provides a procedural vehicle for the consideration of cases with exceptional circumstances." *Ibid.*

Congress later passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). Section 304 establishes a statutory 90-day deadline to file a single motion to reopen, subject to certain exceptions. *Id.* § 304 (codified as amended at 8 U.S.C. 1229a(c)(7)). This statute "transform[ed] the motion to reopen from a regulatory procedure to a statutory form of relief." *Dada* v. *Mukasey*, 554 U.S. 1, 14 (2008).

B. Facts and Procedural History

1. Petitioner Noel Reyes Mata, who was born in Mexico, entered the United States without being admitted. A.R. 214-215. Petitioner was arrested in August 2010 for assaulting his wife, A.R. 535, 541, and pleaded guilty in September. A.R. 526. The judgment notes that petitioner was convicted of an offense that involves family violence. A.R. 526.

After this conviction, DHS issued a Notice to Appear – the document that initiates removal proceedings – charging petitioner with being subject to removal as an alien present in the United States without being admitted or paroled. A.R. 562-563. See also 8 U.S.C. 1229a(e)(2)(A); 8 U.S.C. 1182(a)(6)(A)(i).

Petitioner's first individual hearing before an immigration judge occurred in January 2011. Petitioner's counsel conceded that petitioner was removable but explained that he would request cancellation of

removal. A.R. 196-197. Counsel filed a lengthy application in May. A.R. 212-519.

At an August hearing on this application, the government provided records of petitioner's conviction. See J.A. 15 (admitting A.R. 520-568). The immigration judge concluded that this conviction rendered petitioner ineligible for cancellation of removal. J.A. 19; J.A. 6-13.

2. Petitioner's counsel filed a timely notice of appeal to the Board. A.R. 173-176. The notice indicated an intent to file a separate written brief. A.R. 174. No brief was filed.

DHS sought summary affirmance with a two-page motion, arguing that the immigration judge "correctly determined that the respondent was statutorily ineligible for cancellation of removal." A.R. 143.

On September 21, 2012, the appeal was summarily dismissed by a single Board member. J.A. 4-5. See also 8 C.F.R 1003.1(d)(2) (discussing summary dismissals). The decision noted that the notice of appeal did not identify specific challenges to the immigration judge's decision and that petitioner did not file a brief. J.A. 4-5. The 90-day deadline for filing a motion to reopen began to run at this point. 8 U.S.C. 1229a(c)(7)(C)(i).

Notice of this decision was sent directly to petitioner. A.R. 138. Since 2009, the Board has provided a copy of its final decision to all aliens in proceedings, "regardless of whether the alien is represented by

counsel." See News Release, Executive Office for Immigration Review, Board to Begin Providing Copy of Decision to Aliens Who Are Represented by Counsel (Dec. 19, 2008), *available at* http://www.justice.gov/eoir/press/08/BIAProvidesCourtesyCopy121908.pdf.

By October 10, just 19 days after the decision, petitioner had retained new counsel who was "in the process of filing a Motion to Reopen Mr. Reyes Mata's case." A.R. 122-123.

3. Petitioner filed a motion to reopen on January 14, 2013, 115 days after the Board's final decision. A.R. 88. The motion does not acknowledge that it is untimely, A.R. 88-95, and the record does not indicate why the motion was filed out of time.

DHS opposed reopening for several reasons, including that the motion "was filed more than 90 days after the Board's September 21, 2012 decision." A.R. 77-78.

Petitioner's response requested that the time bar be excused because of "exceptional circumstances." A.R. 69. Petitioner did not expressly request either equitable tolling or the Board's exercise of its *sua sponte* authority to reopen. He simply asserted that "[t]he motion is not time barred if the court finds exceptional circumstances." *Ibid.*

The motion to reopen was denied by a single member of the Board. Pet. App. 6-9. Although one sentence mentions tolling in passing, the decision ultimately concludes that the motion "does not

demonstrate an exceptional situation that would warrant reopening as an exercise of discretion." Pet. App. 9. "Accordingly, the untimely motion will be denied." Pet. App. 9.

4. Petitioner then filed a petition for review with the Fifth Circuit. J.A. 1; 8 U.S.C. 1252(b)(2). In his briefing, petitioner asked the Fifth Circuit to "re-examine its holding in *Ramos-Bonilla v. Mukasey* that motions to reopen before the Board of Immigration Appeals are not subject to equitable tolling." Pet. C.A. Reply Br. 8 (internal citation omitted). Petitioner also argued that the Board's exercise of its *sua sponte* authority to reopen "is subject to judicial review." Pet. C.A. Br. 7-8.

A Fifth Circuit panel consisting of Judges Barksdale, Haynes, and Higginson denied relief in an unpublished per curiam opinion. Pet. App. 1-3.

The Fifth Circuit holds that "equitable tolling is not a basis for filing an untimely or numerically-barred motion [to reopen] under the statute or regulations." *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (5th Cir. 2008) (per curiam). As a result, an argument for equitable tolling "is in essence an argument that the BIA should have exercised its discretion to reopen the proceeding sua sponte based upon the doctrine of equitable tolling." *Ibid.* See also *Ramos-Bonilla* v. *Mukasey*, 543 F.3d 216, 220 (5th Cir. 2008) (citing *Lin* for this proposition).

Following *Ramos-Bonilla*, the panel construed petitioner's argument for equitable tolling as an argument

that the Board should have exercised its discretion to reopen *sua sponte*. Pet. App. 2. Consistent with other circuits, the panel held that it lacked jurisdiction to review the Board's exercise of its discretion not to reopen on its own motion because it had "no meaningful standard against which to judge that exercise of discretion." Pet. App. 2-3. Accordingly, the panel dismissed the petition in part and denied the petition in part. Pet. App. 3.

SUMMARY OF ARGUMENT

The judgment of the Fifth Circuit should be affirmed.

1. The statutory deadline for filing motions to reopen is not subject to equitable tolling. The text contains no tolling provision. Section 1229a(c)(7)(C)(i) requires that a motion to reopen before the Board be filed within 90 days, and the exceptions to this deadline do not include equitable tolling.

Background principles do not counsel in favor of implying an equitable-tolling exception to the statutory deadline. Petitioner's assertion that all non-jurisdictional deadlines are presumptively subject to equitable tolling is incorrect. Rather, background principles suggest that *statutes of limitations* are presumptively subject to equitable tolling. *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1234 (2014). But the deadline for filing a motion to reopen is not a statute of limitations, and therefore this presumption is inapposite.

The government agrees with *amicus* that petitioner and the courts of appeals err in invoking this presumption, U.S. Br. 37, but nonetheless reaches the same result on different grounds. The government argues that deference to the Board supports the availability of equitable tolling, but this argument fails for two reasons. First, the statute is unambiguous, and therefore its plain language leaves no room for deference. Second, the Board's decisions should not receive *Chevron* deference because they are non-precedential and have not interpreted the statute; in applying equitable tolling, the Board has merely followed decisions of the circuit courts. No deference is due to the Board's position.

Nor do policy grounds support an interpretation of the statute that includes equitable tolling. In setting any deadline, Congress must balance the interest in accuracy against the need for finality. The 90-day deadline should be enforced as written.

No source indicates that Congress intended for this text to mean anything other than what it says: "Except as provided" by express textual exceptions, motions to reopen "shall be filed within 90 days." 8 U.S.C. 1229a(c)(7)(C)(i). The Fifth Circuit correctly holds that equitable tolling is unavailable.

2. Because equitable tolling is unavailable, the Fifth Circuit committed no error in construing petitioner's tolling argument as pertaining to the Board's exercise of its *sua sponte* authority to reopen. When a statutory motion to reopen is time-barred, the only

possibility for relief is for the Board to reopen on its own motion. By construing petitioner's tolling argument as it did, the Fifth Circuit did not prejudice petitioner; to the contrary, this construction gave petitioner the benefit of an additional opportunity to obtain relief. Even if not required to do so, appellate courts (and the Board) act within their authority and commit no error by focusing on a filing's substance instead of its form.

3. The courts of appeals lack jurisdiction over challenges to the Board's failure to reopen on its own motion. The government and courts of appeals agree that jurisdiction is absent because courts lack any "meaningful standard against which to judge the agency's exercise of discretion." *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). See U.S. Br. 35 n.13. Neither the regulations nor the Board's decisions provide such a standard.

The Fifth Circuit thus correctly: (1) determined that petitioner's arguments that equitable tolling excused the untimeliness of his motion to reopen could not provide him with relief; (2) construed his arguments as challenging the Board's failure to reopen on its own motion, the only possibility for reopening after expiration of the statutory deadline; and (3) held that it lacked jurisdiction to review the Board's failure to exercise its *sua sponte* authority. The judgment below should be affirmed.

ARGUMENT

I. THE DEADLINE FOR FILING MOTIONS TO REOPEN IS NOT SUBJECT TO EQUITABLE TOLLING.

Logically, the first issue is whether the deadline is subject to equitable tolling.[2] The Fifth Circuit is correct that this deadline is not subject to equitable tolling. The text sets an inflexible 90-day deadline, and there is no reason to believe that Congress meant to include an implied exception for equitable tolling.

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[2] The government is incorrect that whether equitable tolling is available is "not before this Court and should not be addressed at this time." U.S. Br. 14.

The question presented fairly includes the subsidiary question of equitable tolling's availability. See Sup. Ct. R. 14.1(a). The premise of the Fifth Circuit's construal rule is that the statutory deadline cannot be equitably tolled. See *Lin* v. *Mukasey*, 286 Fed. Appx. 148, 150 (5th Cir. 2008) (per curiam) ("Because equitable tolling is not a basis for filing an untimely or numerically-barred motion * * *.").

The petition confirms that the scope of the question presented includes the availability of equitable tolling: "Petitioner asks that the Court rule with finality that 8 U.S.C. § 1229a(c)(7)(C)(i) and 8 C.F.R. § 1003.2(c)(2) are non-jurisdictional claim-processing rules and hence are subject to equitable tolling without an implied request for the BIA to exercise its *sua sponte* power." Pet. 26-27.

Moreover, any assertion that this issue is not properly before the Court should have been made before certiorari was granted. See Sup. Ct. R. 15.2.

A. The statute's plain text does not permit equitable tolling.

"[W]hether equitable tolling is available is fundamentally a question of statutory intent." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014). This statute establishes a firm deadline, which does not provide for tolling: "Except as provided in this subparagraph, the motion to reopen shall be filed within 90 days of the date of entry of a final administrative order of removal." 8 U.S.C. 1229a(c)(7)(C)(i). The regulations repeat this deadline in nearly identical language that is, if anything, more definite. See 8 C.F.R. 1003.2(c)(2) ("must be filed no later than 90 days").

Equitable tolling is inconsistent with this plain text. Congress expressly provided that a motion to reopen shall be filed within 90 days, and petitioner filed his after 115 days. Equitable tolling would "effectively exten[d] an otherwise discrete [deadline] set by Congress." *Lozano*, 134 S. Ct. at 1232.

The express exceptions "provided in this subparagraph" indicate that Congress considered the circumstances in which equity would require a longer deadline and did not include equitable tolling among those exceptions. Congress eliminated the deadline for a motion to reopen filed by an alien seeking asylum if the motion is based on changed country conditions. 8 U.S.C. 1229a(c)(7)(C)(ii). And it included more generous deadlines for motions filed by battered spouses, children, and parents. 8 U.S.C. 1229a(c)(7)(C)(iv). See also 8 U.S.C. 1229a(c)(7)(C)(iv)(III) (permitting

the Attorney General to waive this time limitation "in the case of an alien who demonstrates extraordinary circumstances"). Similarly, Congress provided that aliens who failed to appear at their removal hearing may file a motion to reopen within 180 days. 8 U.S.C. 1229a(c)(7)(C)(iii); 8 U.S.C. 1229a(b)(5)(C)(i). If the alien who failed to appear did not receive proper notice or was held in federal or state custody, he or she may file a motion to reopen at any time. 8 U.S.C. 1229a(b)(5)(C)(ii).

Moreover, when Congress intended other immigration deadlines to include exceptions for good cause or extraordinary circumstances, it wrote exceptions expressly. For example, Congress provided that courts may extend the deadline for filing briefs "upon motion for good cause shown." 8 U.S.C. 1252(b)(3)(C). Similarly, Congress provided that "extraordinary circumstances" may excuse an untimely application for asylum. 8 U.S.C. 1158(a)(2)(D). This Court should heed Congress's choice not to include a similar exception to 8 U.S.C. 1229a(c)(7)(C)(i).

Both the statute and regulations set a firm deadline. Absent some indication that Congress intended for the deadline to include an implicit equitable tolling exception, the statute should be enforced as written.[3]

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[3] To the extent that the legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 is material, it is consistent with not permitting equitable tolling

(Continued on following page)

B. Background principles of law do not create an implied equitable tolling exception to the deadline for filing a motion to reopen.

The deadline for filing a motion to reopen is not jurisdictional,[4] but petitioner overstates that conclusion's consequence. See Pet. Br. 18 ("[N]onjurisdictional rules are subject to a rebuttable presumption in favor of equitable tolling.") (emphasis and internal quotation marks omitted). The presumption that *statutes of limitations* are subject to equitable tolling (sometimes called the *Irwin* presumption) applies only to statutes of limitations. *Lozano*, 134 S. Ct. at 1234. See also *Irwin* v. *Dep't of Veterans Affairs*, 498

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by indicating Congress's concern with finality. Representative Roukema explained that the bill "streamlines and expedites procedures for deporting and excluding illegal aliens." 142 Cong Rec. H2388 (daily ed. Mar. 19, 1996) (statement of Rep. Roukema). "Persons making legitimate claims of asylum must get one hearing and one appeal – no more endless delays, appeals, and readjudication of immigration cases." *Ibid.*

Senator Abraham criticized the manipulation of the immigration laws by criminal aliens "requesting endless review of their orders of deportation" and "abusing unduly generous provisions of judicial and administrative review." 142 Cong. Rec. S4599 (daily ed. May 2, 1996) (statement of Sen. Abraham). He explained that the reforms contained in the legislation "will go still further in that direction [of stopping this manipulation]" than earlier legislation. *Ibid.*

[4] The deadline is instead a "claim-processing" rule that required petitioner to "take certain procedural steps at certain specified times." *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1203 (2011). See also *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 825 (2013) (a "quintessential claim-processing rul[e]").

U.S. 89 (1990). The presumption has no application to deadlines that are not statutes of limitations, such as the deadline for filing a motion to reopen.

1. The presumption of equitable tolling applies only to statutes of limitations.

The significance of a rule being "jurisdictional" is well established. Jurisdictional rules "alte[r] the normal operation of our adversarial system" by imposing an independent obligation on courts to consider jurisdiction at any time. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011). They therefore "can never be forfeited or waived." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006) (quoting *United States* v. *Cotton*, 535 U.S. 625, 630 (2002)). Courts may not "create equitable exceptions to jurisdictional requirements." *Bowles* v. *Russell*, 551 U.S. 205, 214 (2007).

In contrast, non-jurisdictional rules may or may not be subject to equitable tolling. See Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1 (2008). Claims-processing rules may be "mandatory" without being jurisdictional. *Henderson*, 131 S. Ct. at 1203. They may set "inflexible" and "unalterable" deadlines. *Kontrick* v. *Ryan*, 540 U.S. 443, 456 (2004). "[A] time limitation may be emphatic, yet not jurisdictional." *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 825 (describing *Kontrick* in a parenthetical). See also *Carlisle* v. *United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring) ("It is anomalous to classify time prescriptions, even

rigid ones, under the heading 'subject matter jurisdiction.'").

A presumption of equitable tolling applies only to a subset of claims-processing rules: statutes of limitations. *Lozano*, 134 S. Ct. at 1234. See also *Young* v. *United States*, 535 U.S. 43, 49-50 (2002) ("Congress must be presumed to draft limitations periods in light of this background principle [that limitations periods are customarily subject to equitable tolling]."); *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137 (2008) ("[The *Irwin*] presumption seeks to produce a set of statutory interpretations that will more accurately reflect Congress' likely meaning in the mine run of instances where it enacted a Government-related statute of limitations."); *Holland* v. *Florida*, 560 U.S. 631, 645-646 (2010) ("[A] nonjurisdictional federal statute of limitations is normally subject to a rebuttable presumption in *favor* of equitable tolling.") (internal citations and quotation marks omitted). Equitable tolling "applies when there is a statute of limitations" and is "a rule of interpretation tied to that limit." *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1975 (2014).

The source of this presumption is the principle that Congress "legislate[s] against a background of common-law adjudicatory principles," which may create atextual exceptions to statutory text. *Lozano*, 134 S. Ct. at 1232 (quoting *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U.S. 104, 108 (1991) (alteration in original)). For example, common-law immunity

doctrines were incorporated into Section 1983 "notwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities." *Owen* v. *City of Independence*, 445 U.S. 622, 637 (1980). Some principles are so firmly established that this Court "presume[s] that Congress would have specifically so provided had it wished" for them not to apply. *Pierson* v. *Ray*, 386 U.S. 547, 555 (1967).

There is no background adjudicatory principle that deadlines are generally subject to equitable tolling, and this Court has repeatedly refused to extend this presumption beyond statutes of limitations. See, *e.g.*, *Lozano*, 134 S. Ct. at 1234 ("[W]e have only applied that presumption to statutes of limitations."); *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827 ("*Irwin* itself, and equitable-tolling cases we have considered both pre- and post-*Irwin*, have generally involved time limits for filing suit in federal court. * * * We have never applied the *Irwin* presumption [of equitable tolling] to an agency's internal appeal deadline[.]"); *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) (distinguishing a pre-suit notice requirement from a statute of limitations in holding that it is not subject to equitable tolling). Such an extension of the rule – "assum[ing] an implied exception for tolling virtually every time a number appears" in federal statutes – would "work a kind of linguistic havoc." *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997).

The presumption of equitable tolling applies only if the deadline for filing a motion to reopen is a statute of limitations. It is not.

2. The deadline for filing a motion to reopen is not a statute of limitations.

Formally, a statute of limitations "creates 'a time limit for suing in a civil case, based on the date when the claim accrued.'" *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2182 (2014) (quoting Black's Law Dictionary 1546 (9th ed. 2009)). Less formally, the phrase "can refer to any provision restricting the time in which a plaintiff must bring suit." *Id.* at 2185. See also *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013) ("Statutes of limitations establish the period of time within which a claimant must bring an action.").

Under this definition, the deadline for filing a motion to reopen is not a statute of limitations. It does not govern when suit must be initiated, a claim filed, or an action brought. It merely prescribes the period for taking one of the many steps that may occur during the course of litigation, requiring an alien to "take certain procedural steps at certain specified times." *Henderson*, 131 S. Ct. at 1203.

A motion to reopen resembles other post-judgment motions that do not initiate a new proceeding and are not subject to "statutes of limitations." This Court has compared a motion to reopen to "a

motion for a new trial in a criminal case on the basis of newly discovered evidence," *INS* v. *Abudu*, 485 U.S. 94, 110 (1988), and a motion for reconsideration to a Rule 60(b) motion. *Stone* v. *INS*, 514 U.S. 386, 401 (1995). "For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times." *Henderson*, 131 S. Ct. at 1202. These rules are not all statutes of limitations and are not all presumptively subject to equitable tolling.

The distinction between statutes of limitations and other deadlines has deep roots. In 1931, this Court addressed whether the deadline to seek a writ of execution was a statute of limitations. *Custer* v. *McCutcheon*, 283 U.S. 514, 516 (1931). The Court held that the principle that statutes of limitations do not apply to the sovereign did not apply to the deadline for seeking a writ of execution because "[t]he time limited for issuing executions is, strictly speaking, not a statute of limitations." *Id.* at 519. "On the contrary, the privilege of issuing an execution is merely to be exercised within a specified time, as are other procedural steps in the course of a litigation after it is instituted." *Ibid.*

Similarly, in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59 (1956), this Court held that a statute of limitations did not bar the defense of the doctrine of primary jurisdiction. *Id.* at 74. The purpose of statutes of limitations is "to keep stale litigation out of the courts." *Id.* at 72. It had no further application because "the action was already in court

and held to have been brought in time." *Ibid.* Statutes of limitations "are aimed at lawsuits, not at the consideration of particular issues in lawsuits." *Ibid.*

This is not the only circumstance in which statutes of limitations are treated differently than other rules of court procedure. "For purposes of *Erie R. Co. v. Tompkins,* for example, statutes of limitations are treated as substantive." *Jinks* v. *Richland County*, 538 U.S. 456, 465 (2003) (internal citation omitted).

Filing a motion to reopen is merely a procedural step in the course of litigation that has already been instituted. The presumption applicable to statutes of limitation does not establish that Congress intended the deadline in Section 1229a(c)(7)(C)(i) to be subject to an implied exception for equitable tolling.

In addition, as the government notes, the administrative context provides another reason that the presumption of equitable tolling should not apply. See U.S. Br. 37; *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827 (2013) (noting that the Court has "never applied the *Irwin* presumption to an agency's internal appeal deadline"); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 525 (1978) (describing background law as "cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies").

C. Board decisions do not provide a basis for equitable tolling.

Abandoning the reasoning of the courts of appeals, the government argues that equitable tolling should be available because of deference to the Board. U.S. Br. 37. However, the Board's decisions do not provide a basis for concluding that the statutory deadline is subject to equitable tolling.

1. No deference is proper because the statute is not ambiguous.

a. Section 1229a(c)(7)(C)(i) unambiguously establishes a firm deadline for filing a motion to reopen. When a statute is unambiguous, there is nothing for an agency to construe. *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).[5] A presumption that Congress, in writing an unambiguous procedural statute, still intended to permit an agency to "design its own procedural rules," U.S. Br. 39, in contravention of the

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[5] The language of the regulations essentially mirrors the language of the statute. Compare 8 U.S.C. 1229a(c)(7)(C)(i) ("shall be filed within 90 days of the date of entry of a final administrative order") with 8 C.F.R. 1003.2(c)(2) ("must be filed no later than 90 days after the date on which the final administrative decision was rendered"). The correct inquiry is thus whether the agency is entitled to *Chevron* deference: "[T]he existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006).

statute would be an unwarranted extension of administrative deference.

There is no ambiguity in the phrase "shall be filed within 90 days." 8 U.S.C. 1229a(c)(7)(C)(i). Nor does the government assert that the statute is ambiguous. U.S. Br. 37-39. Under ordinary administrative principles, there is no room for deference.

b. *Vermont Yankee* does not support the government's argument. The case holds that courts may not impose additional procedures on agencies beyond those found in the Administrative Procedure Act. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 544 (1978). This decision does not discuss the ability of agencies to create exceptions to statutory procedural rules.

To the contrary, *Vermont Yankee* reaffirms that courts "must determine whether the agency complied with the procedures mandated by the relevant statutes." *Id.* at 549 n.21 (citing *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 417 (1971)). It creates no presumption that agencies may create exceptions to unambiguous statutory mandates.

The regulatory extension of a deadline in *Sebelius* v. *Auburn Regional Medical Center*, 133 S. Ct. 817 (2013), does not establish the Board's ability to extend Section 1229a(c)(7)(C)(i). In *Auburn Regional*, this Court held that a non-jurisdictional time prescription "d[id] not bar the modest extension contained in the Secretary's regulation." *Id.* at 826. The decision rejected an argument that the deadline was jurisdictional. *Id.* at 824-825. See *id.* at 823 n.4 (noting

the appointment of an *amicus* to argue that "the statutory 180-day time limit is jurisdictional"). The opinion does not discuss ambiguity.

There are three distinctions between this statute and the statute at issue in *Auburn Regional*. First, in this statute, Congress included express statutory exceptions, indicating that Congress considered when exceptions should be made to the deadline. Compare 8 U.S.C. 1229a(C)(7)(c)(i) ("Except as provided in this subparagraph * * * ") with *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827 (noting a "180-day deadline, with no statutory exceptions").

Second, there is no longstanding administrative interpretation of this statute. See pp. 27-32, *infra* (arguing that the Board has not interpreted the statute). In contrast, in *Auburn Regional*, Congress had amended the statute six times without expressing disapproval of the regulations permitting extension of the statutory deadline. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827-828.

Third, the history of this statute negates any suggestion that Congress meant to leave this deadline in the hands of the agency. In 1990, Congress directed the Attorney General to place regulatory limits on motions to reopen. But in 1996, Congress superseded these regulatory time and number limits with statutory ones, "transform[ing] the motion to reopen from a regulatory procedure to a statutory form of relief." *Dada* v. *Mukasey*, 554 U.S. 1, 14 (2008). Far from embracing the idea that the Board "should be free to fashion [its] own rules of procedure," U.S. Br. 38

(quoting *Vermont Yankee*, 435 U.S. at 544), Congress chose to impose limits by statute.

c. Nor does the Board's "retained authority and broad discretion to reopen proceedings on its own motion," U.S. Br. 40, indicate similar authority to toll the statutory deadline imposed by Congress. Elsewhere in its brief, the government correctly emphasizes that statutory motions to reopen and the Board's *sua sponte* authority are "logically and doctrinally distinct." U.S. Br. 31.

Amicus agrees with the government that the Board may "exercis[e] discretion to apply equitable tolling principles to, and to consider the merits of, an otherwise untimely motion to reopen filed by an alien." U.S. Br. 40. But the Board may do so only through the exercise of its *sua sponte* authority, not by extending the statutory deadline set by Congress. See pp. 35-40, *infra*.

2. The Board has not interpreted the statute to permit equitable tolling.

Even if the government were correct that the Board could interpret the statute to include equitable tolling, the Board has not done so. Deference is therefore not warranted.

a. No precedential Board decision interprets this statute to allow for equitable tolling. The government relies only on non-precedential decisions. See U.S. Br. 24.

As an initial matter, these non-precedential decisions do not receive *Chevron* deference because they do not "bind more than the parties to the ruling." *United States* v. *Mead Corp.*, 533 U.S. 218, 232 (2001). Lower courts have refused to give deference to these decisions. See, *e.g.*, *Mahn* v. *Attorney Gen.*, 767 F.3d 170, 173 (3d Cir. 2014); *Marmolejo-Campos* v. *Holder*, 558 F.3d 903, 909 (9th Cir. 2009).

Moreover, the Board has not applied equitable tolling based on its own interpretation of the statute or regulation; it has merely followed circuit precedent. "With rare exceptions, the [Board] follows the law of the circuit in which an individual case arises." *Jama* v. *ICE*, 543 U.S. 335, 350 n.10 (2005). See also *Matter of Anselmo*, 20 I. & N. Dec. 25, 31 (B.I.A. 1989) ("[W]e have historically followed a court's precedent in cases arising in that circuit."); *Matter of K-S-*, 20 I. & N. Dec. 715, 718 (B.I.A. 1993) ("[W]e have held that published case law from a United States court of appeals must be followed within the same circuit, except in unusual circumstances[.]").

Research has identified no Board decision discussing equitable tolling that interprets the statutory text or the regulations. The decisions cited by the government are not the product of reasoned interpretation of an agency applying its specialized expertise; they are the product of an agency faithfully deferring to circuit authority.

When the Board considers equitable tolling, it frequently explains, expressly, that it is following

governing circuit authority: "The United States Court of Appeals for the Sixth Circuit, the jurisdiction wherein this case arises, has held that equitable tolling can apply to the time limits on motions to reopen based on ineffective assistance of counsel." *In re Khurram Jehangir Khan*, No. A78442144, 2007 WL 2074553, at *1 (B.I.A. June 15, 2007) (non-precedential).[6]

Similarly, Board decisions within the Fifth Circuit ordinarily note that governing circuit authority rejects equitable tolling: "The Immigration Judge correctly determined that the Fifth Circuit has not adopted the doctrine of equitable tolling in this context." *In re Sergio Ibarra-Amaya*, No. A041776122,

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[6] See, *e.g.*, *In re Julio Alexander Guzman-Vasquez*, No. A044 002033, 2014 WL 1118477, at *1 (B.I.A. Feb. 18, 2014) (non-precedential) ("In cases arising within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, the 90-day filing deadline for motions to reopen is subject to equitable tolling[.]"); *In re Uriah Small*, No. A076565011, 2013 WL 4041234, at *2 (B.I.A. July 30, 2013) (non-precedential) ("The United States Court of Appeals for the Second Circuit has determined that the deadline for motions to reopen deportation proceedings may be equitably tolled to accommodate claims of ineffective assistance of counsel."); *In re Segundo Antonio Rodriguez Rodriguez*, No. A37922683, 2007 WL 2074548, at *1 (B.I.A. June 15, 2007) (non-precedential) ("The United States Court of Appeals for the Third Circuit, the jurisdiction wherein this case arises, has held that aliens raising an ineffective assistance claim in a motion can have the time limits on motions equitably tolled.").

2013 WL 2608334, at *3 (B.I.A. May 28, 2013) (non-precedential).[7]

The decision quoted by the government for the proposition that the Board "generally accepts" equitable tolling is an outlier, in conflict with the decisions cited in the footnotes above. See U.S. Br. 24 (quoting *In re Diaz*, No. A074081757, 2009 WL 2981747, at *2 (B.I.A. Aug. 21, 2009) (non-precedential)). Significantly, the authority relied upon by *Diaz* says nothing about tolling; the word "toll" is not even found in the decision. See *Matter of Compean*, 25 I. & N. Dec. 1 (U.S. Atty. Gen. 2009).

When the Board chooses to reject circuit authority in favor of its own interpretation, it is unmistakable. For example, "We disagree with the reasoning of the

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[7] See also *In re Armando Moreno*, No. A023555408, 2014 WL 3795516, at *2 (B.I.A. June 17, 2014) (non-precedential) ("But under the binding precedent of the United States Court of Appeals for the Fifth Circuit, the jurisdiction in which this case arises, an argument for equitable tolling of the time limitation on motions to reopen is construed as a challenge to our refusal to reopen the proceedings at any time pursuant to our regulatory *sua sponte* authority under 8 C.F.R. § 1003.2(a). To the extent that the respondent seeks to have us apply equitable tolling cases from outside of the Fifth Circuit, we decline to do so." (internal citation omitted)); *In re Marbel Balmore Moreno*, No. A097310769, 2012 WL 3911861, at *1 (B.I.A. Aug. 28, 2012) (non-precedential) (following *Ramos-Bonilla*, construing a motion for equitable tolling as a motion to reopen *sua sponte*; and denying *sua sponte* reopening); *In re Fernando Manuel Herrera De Avila*, No. A096095631, 2011 WL 7071006, at *1 (B.I.A. Dec. 27, 2011) (non-precedential) ("A request for equitable tolling in this context is in essence a request for *sua sponte* reopening.").

[9th Circuit] majority in *Cuevas-Gaspar v. Gonzales*, *supra*, and concur instead with the dissenting opinion in that case." *In re Escobar*, 24 I. & N. Dec. 231, 233 (B.I.A. 2007). Such a decision – which "expressed the BIA's view, based on its experience implementing the INA, that statutory text, administrative practice, and regulatory policy" lead to the same result – received *Chevron* deference. *Holder* v. *Martinez Gutierrez*, 132 S. Ct. 2011, 2021 (2012).

With respect to equitable tolling, however, because the Board has not engaged in "construction of a statutory scheme," no *Chevron* deference is due its decisions. *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). It has not promulgated an interpretation in the exercise of its authority to make rules carrying the force of law. See *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001). Cases applying equitable tolling do not reflect the Board's judgment at all, much less its "fair and considered judgment." *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1208 n.4 (2015) (quoting *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012)).

b. The document that reflects the Board's position regarding the availability of equitable tolling is the response to comments in promulgating the regulatory deadline. Some comments suggested that the agency adopt a "good cause" exception to the number and time limits for motions to reopen. The agency expressly rejected that suggestion:

> The Department does not agree with the commenters' suggestions that a "good cause exception" would be an appropriate procedural mechanism for addressing exceptional cases that fall beyond this rule's time and number limitations. Instead, section 3.2(a) of the rule provides a mechanism that allows the Board to reopen or reconsider sua sponte and provides a procedural vehicle for the consideration of cases with exceptional circumstances.

61 Fed. Reg. 18,900, 18,901-18,902 (April 29, 1996).

Although an agency may change its interpretation, "the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *Ibid.* The Board has never acknowledged nor displayed any awareness that it was changing from this interpretation.

Even if the government were correct that the Board could interpret this deadline as subject to equitable tolling, it has not done so. Deference to the Board is no reason to conclude that this statute is subject to equitable tolling.

D. In establishing a firm deadline, Congress struck a balance between accuracy and finality.

This Court has rejected policy considerations as a basis for interpreting a deadline as subject to equitable tolling: "We do not apply equitable tolling as a matter of some independent authority to reconsider the fairness of legislative judgments balancing the needs for relief and repose. To the contrary, we may apply equitable tolling * * * only if we determine that the * * * drafters so intended." *Lozano* v. *Montoya Alvarez*, 134 S. Ct. 1224, 1236 (2014). That should be the end of the matter.

By their nature, deadlines may produce unfair outcomes. Deadlines "necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them." *United States* v. *Locke*, 471 U.S. 84, 101 (1985).

But "[r]ules of procedure are a necessary part of an orderly system of justice." *Houston* v. *Lack*, 487 U.S. 266, 283 (1988) (Scalia, J., dissenting) (quoting *Thompson* v. *INS*, 375 U.S. 384, 390 (1964) (Clark, J., dissenting)). "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 644 (1992). A legal system must, at some point in time, demand finality in judgments and administrative decisions.

The interest in finality is confirmed by the treatment of post-judgment motions in ordinary civil and

criminal litigation. When the statutory deadline was enacted in 1996, the rules of civil and criminal procedure forbade courts to extend the deadlines for post-judgment motions. Although courts could generally enlarge deadlines, the rules provided that a court "may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a)." Fed. R. Civ. P. 6(b) (1994 ed.). See also Fed. R. Crim. P. 45(b) (1994 ed.) ("may not extend the time for taking any action under Rules 29, 33, 34 and 35"). Rule 45(b) made an "insistent demand for a definite end to proceedings." *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005) (per curiam).

The same is true here. By restricting an alien to filing a motion to reopen within 90 days, Congress demanded a definite end to immigration proceedings. In setting this deadline, like other deadlines, Congress struck a balance between relief and repose. The fairness of this legislative judgment should not be reconsidered by this Court. The inflexible 90-day deadline is not subject to equitable tolling.[8]

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[8] Holding that the 90-day deadline is not subject to equitable tolling does not foreclose application of rules of forfeiture or waiver. See Scott Dodson, *Mandatory Rules*, 61 Stan. L. Rev. 1, 4 (2008). Indeed, the regulations expressly permit DHS to waive the deadline by joining in a motion to reopen. 8 C.F.R 1003.2(c)(3)(iii).

II. BECAUSE EQUITABLE TOLLING IS UNAVAILABLE, AN ARGUMENT FOR EQUITABLE TOLLING IS PROPERLY CONSTRUED AS AN ARGUMENT THAT THE BOARD SHOULD HAVE REOPENED *SUA SPONTE*.

After the expiration of the statutory deadline, a statutory motion to reopen cannot succeed. A time-barred motion to reopen can provide relief only as an invitation for the Board to reopen *sua sponte*. Arguments seeking equitable tolling of the statutory deadline should be interpreted as arguments that the Board should have applied principles of equitable tolling in reopening on its own motion. At a minimum, it was not error for the Fifth Circuit to interpret the petition in this manner.

A. When a party seeks relief through a procedure in which the relief sought is categorically unavailable, courts properly treat the request as invoking a different procedure through which the relief may be available. For example, an untimely Rule 59 motion may be treated as a request for relief under Rule 60. 12 J. Moore, Moore's Federal Practice, ¶ 59.11[4][a] (3d ed. 2012). Construal is common practice in habeas proceedings. *Porter* v. *Adams*, 244 F.3d 1006, 1007 (9th Cir. 2001) (construing a 28 U.S.C. 2241 petition as seeking relief available only under 28 U.S.C. 2255); *United States* v. *Torres*, 282 F.3d 1241, 1244-1246 (10th Cir. 2002) (concluding that a district court properly construed a "writ of coram nobis and/or writ audita querela" as a successive petition under 28 U.S.C. 2255 over which it lacked jurisdiction); *Hamm*

v. *Saffle*, 300 F.3d 1213, 1216 (10th Cir. 2002) (construing a 28 U.S.C. 2254 action as brought under 28 U.S.C. 2241); *United States* v. *Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005) (construing an *audita querela* motion as a successive petition under 28 U.S.C. 2255). Even when a party affirmatively disclaims a particular ground, courts of appeals may construe a claim in that manner when it "appears to be the only cognizable basis" for the claim. *United States* v. *Williams*, 185 Fed. Appx. 917, 919 (11th Cir. 2006).

Habeas is not the only context in which courts recharacterize litigants' pleadings. For example, complaints against federal officials invoking 42 U.S.C. 1983 are properly treated as *Bivens* actions. *Morelock* v. *Ware*, 815 F.2d 79 (6th Cir. 1987) (unpublished). See also *Powell* v. *Fleming*, 27 Fed. Appx. 970, 974 (10th Cir. 2001) (considering construing a 28 U.S.C. 2241 petition as a *Bivens* action); *Walber* v. *HUD*, 897 F.2d 530 (6th Cir. 1990) (unpublished) (construing claims under 42 U.S.C. 1983 and *Bivens* as alleging violations of 42 U.S.C. 1981 and 1982). Complete preemption has a similar effect, treating a wholly preempted state-law cause of action as arising under federal law. *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003). Substance, not form, controls.

Motions to reopen administrative proceedings governed by the APA and Hobbs Act are no exception. To the contrary, the Court has considered the basis on which the "petition that was denied sought reopening" in determining whether a court may exercise

jurisdiction. *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 284 (1987).

This principle is particularly applicable when the document is filed by a pro se party. *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972). Although petitioner was represented by counsel, many who challenge Board decisions are not. See Administrative Office, Judicial Business of the United States Courts 2014, Table B-9 (Sept. 30, 2014).

B. Because the statutory deadline for filing a motion to reopen cannot be equitably tolled, the statutory authority to reopen cannot provide relief after the expiration of the deadline. But it is undisputed that the Board still has the power to reopen removal proceedings, despite the untimeliness of an alien's motion, through the exercise of its *sua sponte* power.

The Fifth Circuit correctly recognized that (1) petitioner's only route to relief was through the Board's exercise of its *sua sponte* authority and (2) petitioner's challenges to the failure to provide this relief truly sounded in challenges to the Board's refusal to exercise its *sua sponte* authority.

C. Petitioner did not suffer prejudice from this interpretation of his arguments. Petitioner would be no better off if the Fifth Circuit had (as the government suggests) denied the petition on its merits. U.S. Br. 32. Even if petitioner gained nothing by the Fifth Circuit construing his petition as challenging the Board's exercise of its *sua sponte* authority, he lost nothing.

Although no meaningful standards currently permit courts to review the Board's exercise of its *sua sponte* authority, this may not always be true in the future. Current rulemaking may supply such standards. See *Matter of Compean*, 25 I. & N. Dec. 1, 2 (U.S. Atty. Gen. 2009) (directing the Executive Office for Immigration Review to initiate rulemaking procedures regarding motions to reopen and ineffective assistance of counsel "as soon as practicable").

The result in this particular case does not undermine the general rule of courts of appeals treating filings, including petitions for review, as seeking relief in a form in which it may be available. This method of construal can afford petitioners benefits in other contexts and has led the Board to employ a similar interpretation.[9]

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[9] Board decisions from the Fifth Circuit have generally followed *Ramos-Bonilla* and construed motions seeking equitable tolling as invitations for the Board to exercise its *sua sponte* authority. See, *e.g.*, *In re Armando Moreno*, No. A023555408, 2014 WL 3795516, at *2 (B.I.A. June 17, 2014) (non-precedential) ("[A]n argument for equitable tolling of the time limitation on motions to reopen is construed as a challenge to our refusal to reopen the proceedings at any time pursuant to our regulatory *sua sponte* authority."); *id.* at *3 ("[T]o the extent the respondent relies on equitable tolling principles, we are bound by the Court's holding in *Ramos-Bonilla*, *supra*, to construe the respondent's request as one for *sua sponte* reopening."); *In re Fernando Manuel Herrera De Avila*, No. A096095631, 2011 WL 7071006, at *1 (B.I.A. Dec. 27, 2011) (non-precedential) ("A request for equitable tolling in this context is in essence a request for *sua sponte* reopening.").

D. The government's reliance on *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), is unavailing. U.S. Br. 29. *Chenery* holds that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." 318 U.S. at 87. A court may not affirm the validity of an agency's order "as a determination of policy or judgment which the agency alone is authorized to make and which it has not made." *Id.* at 88.

As an initial matter, *Chenery* does not apply because the Fifth Circuit did not "judge" the Board's exercise of its *sua sponte* authority. Instead, the Fifth Circuit held that it lacked jurisdiction to judge the exercise of the Board's *sua sponte* authority (the only authority through which petitioner could have received relief). *Chenery* only "pertains to the basis that a court may use for the affirmance of *agency action that is reviewable*" and "has nothing whatever to do with *whether agency action is reviewable*." *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (emphasis in original).

In any event, there is no question that the Board treated petitioner's motion as an invitation to reopen on the Board's motion and denied "reopening as an exercise of discretion." Pet. App. 9. The Fifth Circuit did not find the Board's order valid on the basis of a judgment that the Board did not make.

There is no reason to adopt the government's strict rule that analysis must end with a denial of equitable tolling on the merits. If the deadline for

filing a statutory motion may not be equitably tolled, there is no error in construing arguments seeking equitable tolling of untimely motions as arguments that the Board should have exercised its *sua sponte* authority.

III. THE COURTS OF APPEALS HAVE NO JURISDICTION OVER THE BOARD'S FAILURE TO EXERCISE ITS *SUA SPONTE* AUTHORITY.

Having construed the petition for review as challenging the Board's decision not to reopen the proceeding on its own motion, the Fifth Circuit correctly held that it lacked jurisdiction. *Amicus* agrees with the government that "the *sua sponte* reopening regulation confers no private rights and no judicially manageable standards exist for reviewing such a decision, which is committed to agency discretion by law." U.S. Br. 35 n.13. See *Heckler* v. *Chaney*, 470 U.S. 821, 834 (1985).

Petitioner's assertion that the Board has supplied judicially manageable standards by binding itself to apply principles of equitable tolling in exercising its discretion is unavailing.[10] See Pet. Br. 26

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[10] Petitioner expressly disclaimed this argument in his petition for writ of certiorari:

> Petitioner's qualm is not with the second step of the Fifth Circuit's logic, that the Board's *sua sponte* discretion is unreviewable, but with the first step, that a request for equitable tolling is equivalent to a request

(Continued on following page)

(citing *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (noting that though an agency's discretion may be "unfettered at the outset," it may announce and follow a "general policy by which its exercise of discretion will be governed")).

Petitioner cites the Board's *Lozada* decision as the source of these standards. Pet. Br. 26 (noting *Matter of Lozada*, 19 I. & N. Dec. 637 (B.I.A. 1988)). But *Lozada* does not bind the Board to reopen on its own motion. Rather, the decision establishes procedural requirements for alleging ineffective assistance. 19 I. & N. Dec. at 639 (requiring a detailed affidavit, informing former counsel, including former counsel's response, and explaining whether a disciplinary complaint was filed). A motion to reopen that fails to comply with *Lozada* will ordinarily be denied, but *Lozada* does not compel the Board to grant reopening on its own motion every time its requirements are met.

Moreover, despite *Yueh-Shaio Yang*, this Court has never held that an agency's course of adjudication transformed an unreviewable decision into a reviewable one. This Court should be hesitant to do so now because such a ruling would discourage agencies from explaining their decisions. Transforming an agency's

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for *sua sponte* power. It is only with this latter contention that Petitioner disagrees[.]

Pet. 6. In the light of this concession, the best approach may be to affirm the judgment below while reserving the issue of reviewability of the Board's *sua sponte* authority.

explanations into binding standards that courts can require the agency to follow would create an undesirable incentive for agencies not to explain their exercise of discretionary authority.

For this reason, an agency's mere reference to legal principles in explaining its refusal to exercise its discretion does not transform an unreviewable decision into a reviewable one. See *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 283 (1987) (rejecting the proposition that "if the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable").

B. *Amicus* National Immigrant Justice Center's (NIJC) reliance on *Kucana* v. *Holder*, 558 U.S. 233 (2010), is misplaced. *Kucana* involved judicial review of "the statutory right to file a motion to reopen." *Dada* v. *Mukasey*, 554 U.S. 1, 14 (2008). It held that the Board could not, by regulation, make this statutory right unreviewable. *Kucana*, 558 U.S. at 250 ("It is unsurprising that Congress would leave in place judicial oversight of this important procedural safeguard[.]") (internal quotation marks and alterations omitted). But there is no statutory right (nor even authority) for the Board to reopen on its own motion. This power is wholly a creature of regulatory executive grace.

NIJC is correct that an agency "may adopt rules in this context that are legal in nature," NIJC Br. 9, but the Board has not, either by rule or by adjudication, bound itself to exercise its discretion in a specific

manner. Because no standard applies to the Board reopening on its own motion, the Fifth Circuit correctly held that it lacked jurisdiction.

CONCLUSION

The judgment of the Fifth Circuit should be affirmed.

Respectfully submitted,

WILLIAM R. PETERSON
Counsel of Record
CHARLES R. FLORES
BECK REDDEN LLP
1221 McKinney Street
Suite 4500
Houston, TX 77010
(713) 951-6236
wpeterson@beckredden.com

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No. 14-185

IN THE

Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

Charles Roth
Counsel of Record
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle Street
Suite 1300
Chicago, IL 60604
312-660-1613

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INTEREST OF THE AMICUS CURIAE

Amicus National Immigrant Justice Center (NIJC) is a non-profit agency that represents immigrants and asylum-seekers. NIJC collaborates with more than 1500 pro bono attorneys to represent thousands of immigrants and asylum-seekers annually. NIJC has represented numerous individuals seeking equitable tolling in order to seek reopening of their cases, many due to ineffective assistance of counsel. NIJC has also represented individuals seeking reopening under the residual reopening authority of 8 C.F.R. § 1003.2(a).[1]

SUMMARY OF THE AMICUS ARGUMENT

The Court should decide in favor of the petitioner in this case by holding that equitable tolling determinations are not made under the Board's residual or *sua sponte* reopening authority. Equitable tolling functions by altering when a particular limitations period begins and ends. As both parties note, the Fifth Circuit misapprehended the nature of equitable tolling in this context, and its finding that it lacked jurisdiction was based on that misanalysis. The Court need go no further to resolve this case.

We write in order to address a related matter adverted to in the government's brief. The unpublished decision below held, and the government's brief now argues, that jurisdiction is precluded, as a blanket matter, over the BIA's refusal to exercise its residual

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[1] Pursuant to Rule 37.6 of the rules of this Court, amicus affirms that no counsel for a party authorized this brief in whole or in part and that no person other than amicus and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to this filing have been submitted to the Clerk.

regulatory authority to reopen a case *sua sponte*,[2] because "no judicially manageable standards exist for reviewing such a decision." U.S. Br. 35 n.13 (citing 5 U.S.C. § 701(a)(2)). We respectfully submit that the matter is not so straightforward. First, the Court has never held, and should not now hold, that the detailed jurisdictional scheme in the immigration statutes is displaced by the general jurisdictional rules of the Administrative Procedures Act. Second, the BIA does address legal and constitutional claims in the context of a *sua sponte* reopening decision. Even if background "no law to apply" principles may bar jurisdiction in the removal context, such claims (and potentially others that may be raised in that context) plainly present manageable legal principles. Accordingly, the Court should decline to prejudge a broad issue that it wisely left open in *Kucana*, the resolution of which is not required by this case. *See Kucana v. Holder*, 558 U.S. 233, 252 (2010).

ARGUMENT

I. EQUITABLE TOLLING DETERMINATIONS ARE NOT MADE UNDER THE BOARD'S *SUA SPONTE* AUTHORITY.

The primary issue in this case is whether the Fifth Circuit erred in ruling, contrary to ten circuits, that equitable tolling determinations should be "construed" as arising under the Board's *sua sponte* authority. As the Petitioner and Respondent argue, the

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[2] Courts frequently refer to this authority as "*sua sponte*" reopening authority or authority to reopen on the Board's own motion. This is something of a misnomer, since *sua sponte* reopening is generally invoked at the request of a party. However, for sake of clarity, this brief discusses that authority employing the terminology generally used by courts of appeals.

Court should reject the Fifth Circuit's analysis and follow the logic of the other ten circuits that have held equitable tolling determinations to be outside the Board's *sua sponte* authority. Pet'r's Br. 14; U.S. Br. at 28.

Equitable tolling is a general legal concept that has been employed in this country since at least 1804. *See Jones v. Conoway*, 4 Yeates 109 (Pa. 1804) (applying the doctrine of equitable tolling in a slavery case); *Sherwood v. Sutton*, 21 F. Cas. 1303 (C.C.D.N.H. 1828) (No. 12,782) (Story, J., in circuit).

By nature and definition, tolling acts "to suspend or stop temporarily," Black's Law Dictionary 1334 (5th ed. 1976). Thus, under traditional tolling principles, the "statutes of limitations ... shall not begin to run until" the end of the circumstance causing the tolling. *Exploration Co v. United States*, 247 U.S. 435, 449 (1918); *Bailey v. Glover*, 88 U.S. 342, 21 Wall. 342, 348 (1875); ("[T]he bar of the statute does not begin to run until the fraud is discovered."). Tolling is not an exception to a statutory deadline; rather, it governs the "clock" applicable to such a deadline. It is logical to say that the 90 day reopening deadline can be tolled; whereas there is no deadline for the Board's residual reopening authority, and it makes no sense to say that one can toll a nonexistent deadline.

The Court need go no further to resolve this case.

II. CONGRESS' DETAILED JURISDICTIONAL RULES FOR LEGAL AND DISCRETIONARY IMMIGRATION MATTERS SHOULD GOVERN IN THIS CONTEXT.

The immigration statute includes a detailed elaboration of federal court jurisdiction over removal orders. In this context, background administrative law principles are supplanted by more specific jurisdictional rules. For this reason, the Court should hesitate to import general jurisdictional limitations into the removal order context.

A. Immigration-Specific Jurisdictional Rules Are Detailed and On Point.

The Solicitor General submits that "review of final orders of removal is governed by the background principles" of the Administrative Procedures Act, including 5 U.S.C. § 701(a)(2). U.S. Br. at 16. But it is not at all apparent that a separate jurisdictional analysis should be required under § 701(a)(2), where Congress has enacted specific jurisdictional rules governing discretionary matters in the immigration context. In another context, the Court has found that where Congress has adopted "exception[s] to the general applicability of the Hobbs Act procedures ... it must be construed as creating a procedure different from normal practice under the Act." *Stone v. INS*, 514 U.S. 386, 397 (1995); *see also Marcello v. Bonds*, 349 U. S. 302, 310 (1955).

The INA not only includes a specific, detailed statutory scheme governing immigration appeals generally, *see* 8 U.S.C. § 1252, but Congress enacted specific statutory rules governing judicial review of discretionary matters. 8 U.S.C. §§ 1252(a)(2)(B); (a)(2)(D). Under the INA, courts first ask whether the matter

at issue is a discretionary matter related to one of five enumerated discretionary matters. 8 U.S.C. § 1252(a)(2)(B)(i). If not, courts ask whether it relates to a matter "specified under this subchapter to be in the discretion of the Attorney General," other than asylum. *Id.* § 1252(a)(2)(B)(ii). If either § 1252(a)(2)(B)(i) or (ii) is implicated, federal court jurisdiction is not plenary; but even then, Congress permits review over legal and constitutional questions. *Id.* § 1252(a)(2)(D).

These provisions are part of "a precisely drawn, detailed statute" governing jurisdiction over discretionary matters, which "pre-empts more general" rules. *Hinck v. United States*, 550 U.S. 501, 506 (2007) (quoting *EC Term of Years Trust v. United States*, 550 U.S. 429, 434 (2007) (internal quotation marks omitted).

In light of the detailed and specific jurisdictional scheme in the INA, it is at best doubtful that the general provisions of § 701(a)(2) govern; "it is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). That canon of construction is "particularly true where... 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *RedLAX Bank Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting).

Sections 1252(a)(2)(B) and (D) are specifically applicable to discretionary agency decisions in the removal context. They are part of "a comprehensive scheme" which "deliberately target[s] specific prob-

lems with specific solutions." *RedLAX*, 132 S. Ct. at 2071. These specific rules should govern over more general principles.

The Court addressed § 1252(a)(2)(B)(ii) in *Kucana v. Holder*, 558 U.S. 233 (2010). Therein, the Court held that § 1252(a)(2)(B)(ii) only precludes review over those matters specified as discretionary by statute. Under *Kucana*, where Congress's carefully calibrated judicial review scheme prohibits judicial review, no judicial review is available. Where Congress has not prohibited review, it continues to be available. It is black letter law that where jurisdiction is granted by Congress, and the requirements of Article III standing are met, courts have a "virtually unflagging obligation" to adjudicate the matters that come before them. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

Moreover, the approach advocated by the Government would be inconsistent with *Kucana* to some extent. The Solicitor General argues that courts lack jurisdiction over residual reopening decisions, because Board case law does not provide a sufficiently clear framework to permit federal judicial review. U.S. Br. 35, n.13 (citing *Kucana*, 558 U.S. at 251, n.18).

However, it is clear, as the Government does not contest, that judicially manageable standards may be found in formal and informal policy statements and regulations as well as in statutes. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410

(1971). Thus, under the Government's approach, the Board would be able to create or contract federal court jurisdiction over residual reopening matters by increasing or decreasing the clarity of its precedent. [3]

Thus, under the approach advocated by the Solicitor General, "the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review." *Kucana*, 558 U.S. at 252. *Kucana* rejected the suggestion that agencies should be able by regulation or case law to alter federal court jurisdiction as "an extraordinary delegation of authority." *Id.* Yet under the government's reasoning, that which the INA does not permit may be accomplished under § 701(a)(2).

The potential inconsistency does not stop there. To the extent that § 701(a)(2) principles were found applicable to discretionary immigration matters, and a particular discretionary matter were found to qualify, courts would then need to undertake a second, separate analysis to decide whether jurisdiction over non-discretionary matters is permitted in that context. The answer to that question may be disputed. *Cf. Anaya Aguilar v. Holder*, 683 F.3d 369, 372 (7th Cir. 2012) (finding jurisdiction over *sua sponte* matters precluded except for statutory and constitutional questions) *with Gor v. Holder*, 607 F.3d 180, 193 (6th Cir. 2010) (finding jurisdiction over *sua sponte* matters precluded even for statutory and constitutional questions).

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[3] Amicus sees no limiting principle which would prevent the Board from similarly insulating other discretionary matters from abuse-of-discretion review, simply by refusing to issue any rules elaborating on that authority.

Particularly in light of the general presumption "favoring interpretations of statutes [to] allow judicial review of administrative action," *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 63-64 (1993) (quoting *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991)), the Court should be leery of the Solicitor General's argument. Jurisdiction-stripping statutes should be read narrowly, not broadly. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995); *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

B. *Sua Sponte* Matters Frequently Raise or Involve legal issues.

Even if it were accepted that there is no law to apply to the discretionary aspects of *sua sponte* decisions, many *sua sponte* decisions involve legal and constitutional issues. These can include changes in law, vacatur of convictions, agency error in the reopening analysis, and other legal and constitutional questions.

1. Longstanding Agency Policy Permits *Sua Sponte* Reopening for Changes in Law.

The Board has a longstanding rule that even where an order was proper at the time it was entered, a noncitizen should not be removed on the basis of an order whose legal foundations have been undermined by intervening law. *See Matter of Farinas*, 12 I. & N. Dec. 467, 472 (BIA 1967).

For instance, in *Farinas*, a noncitizen was ordered deported in 1946 on the ground that he had effectuated an entry to the United States when he transferred ships at a Canadian port while traveling between Washington State and Alaska. *Id.* at 468. Subsequent to the entry of the deportation order, but pri-

or to its execution in 1950, this Court's decision in *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), made clear that Farinas had not in fact made an "entry" into the United States when he transferred ships. Accordingly, Farinas "was not properly subject to deportation." *Farinas*, 12 I. & N. Dec. at 473. The Board held that "neither the finding of deportability nor the order of deportation is clothed with the armor of immunity from attack while the alien is still in the United States and before the order of deportation is executed," *id.* at 471, and granted *sua sponte* relief. *See also Matter of Malone*, 11 I. & N. Dec. 730, 732 (BIA 1966); *Matter of Bowe*, 17 I. & N. Dec. 488 (BIA 1981) (reopening *sua sponte* in light of circuit authority rejecting Board's legal position).

Amicus seeks neither to challenge nor support the Board's approach, which has some support elsewhere in the law. *Cf. United States v. Grubbs*, 547 U.S. 90, 96 n.2 (2006) (government may not execute a search warrant if, subsequent to issuance but prior to execution, the government comes to understand that probable cause was lacking). Rather, the point is that the Board may adopt rules in this context that are legal in nature and that may therefore be reviewed for legal error, even if the Board describes its decision as one issued under its residual reopening authority.

2. *Sua Sponte* Reopening is Employed Where Convictions Are Vacated On Constitutional or Legal Grounds.

Another area that frequently requires the use of *sua sponte* reopening is that of vacated convictions. Criminal convictions may render noncitizens removable from the United States. *See* 8 U.S.C. §

1227(a)(2) (listing multiple criminal grounds of removability). Where a conviction is later held unlawful or improper, noncitizens may ask the agency to revisit the resulting removal order.

The Board has long utilized its residual reopening authority to reopen where an underlying conviction is found invalid after the expiration of the reopening period. *See Cruz v. Att'y Gen. of U.S.*, 452 F.3d 240, 246, n.3 (3d Cir. 2006) ("The parties have not identified, and we have not found, a single case in which the Board has rejected a motion to reopen as untimely after concluding that an alien is no longer convicted for immigration purposes.").[4]

That said, within that context, it is sometimes unclear whether the underlying conviction should be considered as vacated, or not. The Board has issued a number of cases elucidating its approach to that determination. *See Matter of Roldan*, 22 I. & N. Dec. 512, 528 (BIA 1999); *Matter of Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (BIA 2000); *Matter of Adamiak*, 23 I. & N. Dec 878 (2006). The Board's rule in the reopening context, *see Matter of Chavez-Martinez*, 24 I. & N. Dec. 272 (BIA 2007), has been disapproved in the Sixth and Ninth Circuits. *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Pickering v. Gonzales*, 465 F.3d 263, 270 (6th Cir. 2006).

Again, Amicus's point is not that the Board's approach is correct, in whole or in part; but rather that the Board has adopted a set of legal standards that

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[4] The circumstance of a conviction vacated after the removal order would almost invariably involve "facts which, through no fault of [the noncitizen], the original proceeding did not contain." *Cf. ICC v. Locomotive Engineers*, 482 U.S. 270, 279 (1987)

may be reviewed for legal error. *See Negusie v. Holder*, 555 U.S. 511, 516 (2009).

3. The Board's Exercise of *Sua Sponte* Authority May Turn on Legal Factors Such as the Board's View of Its Powers.

The Board's exercise of its *sua sponte* authority is also influenced by its understanding of its own jurisdiction and powers. The scope of the Board's reopening authority has often been at issue in recent years because in some cases, the Board has authority to order removal while the Department of Homeland Security (DHS) is authorized to grant relief from removal. *See, e.g., Matter of Yauri*, 25 I. & N. Dec. 103 (BIA 2009) (denying reopening where residency application could only be directed at DHS under 8 C.F.R. § 1245.2(a)(1)(ii)); *Matter of Hashmi*, 24 I. & N. Dec. 785 (BIA 2009) (setting forth considerations for granting a continuance while related matter is pending before DHS).

The BIA takes the position that it "ha[s] not been granted authority to reopen the proceedings of respondents ... to pursue matters that could affect their removability if we have no jurisdiction over such matters." *Yauri*, 25 I. & N. Dec. at 110. The Board's approach has been rejected by the Second, Seventh, Eighth, and Ninth circuits. *Singh v. Holder*, 771 F.3d 647, 653 (9th Cir. 2014); *Freire v. Holder*, 647 F.3d 67, 71 (2d Cir. 2011); *Clifton v. Holder*, 598 F.3d 486, 493 (8th Cir. 2010); *Potdar v. Mukasey*, 550 F.3d 594, 594 (7th Cir. 2008); *Ceta v. Mukasey*, 535 F.3d 639, 648 (7th Cir. 2008); *Ni v. BIA*, 520 F.3d 125, 130–32 (2d Cir. 2008); *Kalilu v. Mukasey*, 516 F.3d 777, 780 (9th Cir. 2008); *but see Scheerer v. U.S. Att'y General*,

513 F.3d 1244 (11th Cir. 2008) (deferring to Board's approach).

Amicus agrees with the circuit majority that the Board's approach is incorrect; but either way, this issue presents a clear instance of a legal determination arising in the *sua sponte* reopening context. Federal courts have competence to determine such legal claims even if the Board frames decisions in terms of its *sua sponte* reopening authority.

C. Even If No Law to Apply Principles Were a Bar to Judicial Review Here, They Would Not Bar Questions of Law or Constitutional Questions, as the Majority of Circuits Agree.

In the *Kucana* decision, the Court left open the question of whether and when federal courts could review denials of *sua sponte* reopening. 558 U.S. at 251, n.18. Although, as the Court noted, many Courts of Appeals have found their jurisdiction barred where they perceived "no law to apply," under 5 U.S.C. § 701(a)(2), the vast majority of the Courts of Appeals have reviewed denials of *sua sponte* reopening that involved questions of law and constitutional questions.

Most courts of appeals have held that review is available for constitutional and statutory questions. *See, e.g.*, *Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) (permitting review of "all constitutional claims or questions of law raised by the BIA's exercise of its discretion") (quotations omitted); *Luis v. INS*, 196 F.3d 36, 41 (1st Cir. 1999) ("This court has jurisdiction to review Luis's due process claim.") (citing *Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999)); *Cruz*, 452 F.3d at 246 (finding jurisdiction to review a

denial when an underlying conviction had been vacated would be present); *Nawaz v. Holder*, 314 F. App'x 736, 737 (5th Cir. 2009) ("While we do not have jurisdiction to consider Nawaz's non-constitutional challenges to the BIA's refusal to reopen his removal proceedings *sua sponte*, we retain jurisdiction to consider constitutional challenges that were raised before the BIA."); *Anaya Aguilar*, 683 F.3d at 372 ; *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (en banc) ("Although this court lacks jurisdiction over Tamenut's challenge to the BIA's decision not to reopen *sua sponte*, we generally do have jurisdiction over any colorable constitutional claim."); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1106-7 (9th Cir. 2006) (jurisdiction to review is present where a " 'key part' of the government's case [for] removal," is challenged); *Lenis v. U.S. Att'y Gen.*, 525 F.3d 1291, 1294 n.7 (11th Cir. 2008) ("[A]n appellate court may have jurisdiction over constitutional claims related to the BIA's decision not to exercise its *sua sponte* power.").

As the First Circuit reasoned in *Bernal-Vallejo*, "a due process argument does not involve a matter that Congress committed to agency discretion." 195 F.3d at 64. Just as courts analytically isolate constitutional and legal claims from abuse-of discretion claims in other contexts, see Br. of Resp. at 22, n.7, there is no reason why courts should not do the same for claims of legal error and constitutional claims in the *sua sponte* context.

Only the Sixth and possibly the Fourth circuits have taken the position that cases involving constitutional or statutory questions could not be reviewed for denials of *sua sponte* reopening. *Gor*, 607 F.3d at

193; *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Harchenko v. INS*, 379 F.3d 405, 409 (6th Cir. 2004); *see also Mosere v. Mukasey*, 552 F.3d 397, 400 (4th Cir. 2009).

In Amicus's view, those circuits err. Insulating legal error from review because it arises in relation to a discretionary calculus is plainly inconsistent with *St. Cyr*, 533 U.S. at 307-08 (distinguishing between "[e]ligibility ... governed by specific statutory standard" and "the actual granting of relief [that is] not a matter of right under any circumstances, but rather is in all cases a matter of grace"). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 443-44 (1987) (distinguishing between discretion as to the ultimate decision and the criteria for eligibility for relief).

There is always "law to apply" in reviewing a constitutional or legal question. *UAW v. Brock*, 783 F.2d 237, 245-46 (D.C. Cir. 1986) ("[I]t seems almost ludicrous to suggest that there is 'no law to apply' in reviewing whether an agency has reasonably interpreted a law."); *see also, Diebold v. United States*, 947 F.2d 787, 798 (6th Cir. 1991) (The constitution or law itself would "provide standards by which to judge an agency's ... decision."); *Davis Enters. v. EPA*, 877 F.2d 1181, 1185-86 (3d Cir. 1989); *Electricities of N.C., Inc. v. Southeastern Power Admin.*, 774 F.2d 1262, 1267 (4th Cir. 1985); *Woodsmall v. Lyng*, 816 F.2d 1241, 1246 (8th Cir. 1987); *Montana Air Chapter No. 29, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 898 F.2d 753, 756-57 (9th Cir. 1990).

Moreover, the reasoning that would insulate some discretionary determinations from review would have no application to legal or constitutional questions: *cessante ratione legis cessat ipse lex. Zadvydas v. Da-*

vis, 533 U.S. 679, 698 (2001) ("[T]he rationale of a legal rule no longer being applicable, that rule itself no longer applies.").

Finally, the majority rule would be consistent with Congress's statutorily-expressed intent to permit judicial review over all questions of law and constitutional questions, even those arising in the context of discretionary matters. See 8 U.S.C. §§ 1252(a)(2)(B), (D).[5] Even if the Court were not persuaded that the INA's jurisdictional rules preclude the application of general jurisdictional rules, the statutory grant of jurisdiction at § 1252(a)(2)(D) would still be entitled to substantial respect, and would counsel adoption of a legal regime which at least permits review over all such matters.

In the view of Amicus, the Court need not address these matters in order to decide this case. Because a request for equitable tolling is not an appeal to the Board's *sua sponte* authority, the Court need not decide the power of federal courts to review *sua sponte* decisionmaking. The Court should await a case which would actually turn on that question, and after full briefing by the parties, before resolving the issue.

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[5] It is also relevant to note that Congress adopted § 1252(a)(2)(D) in partial response to the fact that presumptions favoring judicial review are at their height when applied to pure questions of law. *St. Cyr*, 533 U.S. at 300, 305, 308. Whatever the virtues of insulating agency exercise of discretion from federal court oversight, that logic does not apply the insulation of legal and constitutional questions. *See* Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1395-1397 (1953).

III. THE TRADITION OF JUDICIAL REVIEW OVER MOTIONS TO REOPEN IS LONGSTANDING AND IMPORTANT.

The history of federal judicial review in the reopening context illustrates that judicial review has played, and continues to play, an important and continuing role.

A. The History of the Board's Reopening Rules and Ongoing Judicial Review.

Some aspects of the Board's reopening authority are now codified in statute, *see* 8 U.S.C. § 1229a(c)(7), but the residual or *sua sponte* aspect of that authority remains a creature of regulation. 8 C.F.R. § 1003.2(a). The regulatory nature of residual reopening is no bar to federal court review.

The Board has found itself authorized to reopen matters since its inception, before any regulations or statutes were adopted. *See, e.g.*, *Matter of B-*, 1 I. & N. Dec. 47, 49-50 (BIA 1941) (exclusion proceedings reopened for evidence that fraud conviction in Germany was due to "political considerations, to wit: the fact that the defendant was a Jew"); *Matter of T-*, 1 I. & N. Dec. 158, 158 (BIA 1941) (reopening where Mexican farmworker had resided 40 years in United States and had wrongly believed that prior removals precluded good moral character); *Matter of W-*, 1 I. & N. Dec. 154, 156 (BIA 1941) (German refugee found admissible despite expired visa due to delays in sea voyage). Regulations were ultimately promulgated, specifying limitations and requirements for reopening. 26 FED.REG. 12110 (Jan. 22, 1962), codified at 8 C.F.R. § 103.5. Congress codified reopening rules in statute in 1996. *See* 8 U.S.C. § 1229a(c)(7).

Federal courts reviewed reopening decisions in the period before regulations were promulgated. *See, e.g., United States v. Shaughnessy*, 221 F.2d 578, 580 (2d Cir. 1955) (considering retroactive application of statute to prior adultery); *U.S. ex rel. Lee Kum Hoy v. Shaughnessy*, 237 F.2d 307, 312 (2d Cir. 1956) vacated sub nom. *United States ex rel. Lee Kum Hoy v. Murff*, 355 U.S. 169 (1957) (reopening sought to prove that blood testing was required based on racial discrimination against Chinese).

After regulations were promulgated, the federal courts continued to address reopening matters. *INS v. Jong Ha Wang*, 450 U.S. 139, 140-41 (1981) (per curiam) (noting absence of statutory authority for reopening); *INS v. Rios-Pineda*, 471 U.S. 444 (1985); *INS v. Abudu*, 485 U.S. 94, 104-111 (1988); *INS v. Doherty*, 502 U.S. 314, 322-324 (1992); *Stone*, 514 U.S. at 401.

In short, the fact that Congress did not specifically authorize reopening in statute until 1996 was no bar to federal court review then, nor did it deprive courts of the means of undertaking that review or of granting appeals in meritorious cases. The same is true today; the regulatory nature of residual reopening authority is no bar to the exercise of judicial review.

B. Review of Reopening Matters is Important.

Motions to reopen, and judicial review thereof, continue to serve the "important purpose" of "ensur[ing] a proper and lawful disposition" of a removal matter. *Dada v. Mukasey*, 554 U.S. 1, 18 (2008).

Judicial review plays a crucial role in ensuring the fairness and substantive legality of the system, even as to discretionary matters. *United States ex rel. Ac-*

cardi v. Shaughnessy, 347 U.S. 260 (1954); *St. Cyr*, 533 U.S. at 310. It cannot be disputed that removal matters implicate weighty and important interests. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile."); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Deportation may result in "loss of both property and life; or of all that makes life worth living."); *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting). Some federal court review over those matters, albeit limited and deferential, is crucial.

CONCLUSION

The Court has no occasion in the instant matter to reach the questions addressed in this brief, because the Fifth Circuit erred in treating equitable tolling matters as decisions issued *sua sponte* and unreviewable by a court of appeals. In any event, however, the Court should not conclude as a blanket matter that *sua sponte* decisions are unreviewable; at the very least, federal courts may review legal and constitutional questions arising in such decisions.

Respectfully submitted,

Charles Roth
Counsel for Amicus Curiae
NATIONAL IMMIGRANT
JUSTICE CENTER
208 South LaSalle Street
Suite 1300
Chicago, IL 60604

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